



Multistate Professional Responsibility Examination

90 Willis Avenue, Mineola, NY 11501
1.800.635.6569
info@pieperbar.com
www.pieperbar.com

To Kristina



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by

John Gardiner Pieper, Esq.

Troy Gardiner Pieper, Esq.

Damian John Pieper, Esq.

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PREFACE

A passing grade on the Multistate Professional Responsibility Exam (MPRE) is a requirement for admission to the Bar in all but three jurisdictions.

The MPRE tests a candidate's knowledge and ability to apply the American Bar Association (A.B.A.) Model Rules of Professional Conduct and the A.B.A. Model Code of Judicial Conduct, as well as controlling constitutional decisions and generally accepted principles established in leading federal and state cases, the Federal Rules of Evidence, and the Federal Rules of Civil Procedure. The correct answer to questions testing concepts not specifically addressed by the A.B.A. Model Rules and Code of Judicial Conduct will be the view reflected in the majority of cases, statutes, or regulations on the subject.

The MPRE is written by the National Conference of Bar Examiners (NCBE) and administered every March, August, and November at various locations, which likely include your law school, at least once per year. While you may take the exam anytime during law school or even after you sit for the bar exam (though you must pass the MPRE and the bar exam within three years of each other), we recommend taking it in conjunction with your ethics coursework in law school. This way, you will complete this bar admission requirement while the material is fresh in your memory. In addition, your preparation for the MPRE will serve you well on your law school ethics exam. Although you can sit for the MPRE as often as you like, as with any bar exam, one time is a charm. For test schedules, locations, and to apply to take the MPRE, visit the NCBE website <http://www.ncbex.org/exams/mpre/>.

The MPRE consists of 60 multiple choice questions, each posing a fact pattern followed by four answer choices. The Bar Examiners give credit only for the "best" of those answer choices. Of the 60 questions, there are 50 scored questions and 10 non-scored pretest questions. Since the pretest questions are indistinguishable from those that are scored, it is important that you answer all of the questions on the examination. Your final score will be calculated based on how many scored questions you answer correctly. You will not be penalized for incorrect answers, so you will not want to leave any questions unanswered.

You must complete the examination within the two hour and five minute time limit. You will need to answer correctly approximately 35 of the scored questions to attain the total minimum passing scaled score of 85 required in New York. For the minimum passing scores required in other jurisdictions, visit the NCBE website listed above or your local bar examiners' website.

In preparing for the MPRE, you should attend the Pieper MPRE review (check www.pieperbar.com or info@pieperbar.com for dates and locations), study your lecture notes, review the materials in the first eleven chapters of this text, and then complete the three practice examinations following Chapter 11. The A.B.A. Model Rules of Professional Conduct with the official comments are also an excellent resource if you can find time to read them before the exam. They are approximately 100 pages in length and are available on Lexis and Westlaw.

By following the Pieper program, you will be prepared to take and pass the MPRE and be that much closer to admission to the Bar and a promising career as an attorney. Best wishes in your future endeavors, and thank you for choosing to study with Pieper Bar Review.

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CHAPTER I

REGULATION OF THE LEGAL PROFESSION

A. COURTS' INHERENT POWER TO REGULATE LAWYERS' CONDUCT

Regulations governing lawyers' conduct are contained in numerous sources, including general laws in ethics codes, consumer legislation, penal codes, rules of evidence, the Uniform Partnership Act, and professional corporation laws. Regulatory rules can also be promulgated by administrative agencies, such as the U.S. Tax Court and the Patent and Trademark Office.

However, most regulations governing lawyers arise in the form of a lawyers' code of conduct promulgated and approved by each state's highest court. Historically, state courts have the inherent and exclusive power to regulate the conduct of lawyers. In the federal system, federal courts likewise have the inherent power to regulate lawyers' conduct in federal practice. Thus, rules for admission, discipline, and disbarment are usually promulgated by each state's highest court. Some states take the position that the judiciary's inherent power to regulate lawyers is derived from the state's constitution, and that any interference therewith by the legislature is an unconstitutional violation of the separation of powers doctrine. *See Mississippi Bar v. McGuire*, 647 So.2d 706 (Miss. 1994); *Restatement (Third) of the Law Governing Lawyers* § 1 cmt. c.

In many states, the state courts have delegated some of their power over lawyering and lawyers' conduct to bar associations. Thirty states' bar associations are "Unified" ("integrated,") which means that they require membership as a continuing condition to practicing law in their states. *ABA Formal Op. 470, n.1* (2014). The dues that these bar associations collect must be used solely to fund activities relevant to the profession, and may not be used for political or ideological purposes. *County of Ventura v. State Bar of California*, 41 Cal.Rptr.2d 794 (Cal. Ct. App. 1995).

Compulsory bar dues can only be used to fund expenditures "reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services available to the people of the state." *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990). Thus, members may ask the state bar association to refund any portion of the mandatory fee they have paid which is devoted to political or ideological activities. Indeed, to force compulsory contributions for a cause with which a member disagrees would violate the member's First Amendment rights. *Id.*

As you continue through this chapter, keep in mind that a lawyer's omission or commission of acts in violation of existing regulations may constitute not only ethical rule violations, but also torts (i.e., legal malpractice or fraud) or even crimes, subjecting the lawyer to civil or criminal liability. Also be aware, however, that not every ethical violation is a crime, and not every crime constitutes an ethical violation.

B. ADMISSION TO PRACTICE

To protect the public, courts require those wishing to practice law to obtain a license, which can only be obtained or maintained by individuals who fulfill certain criteria (e.g., payment of dues,

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educational requirements, passing of a bar exam, and possession of good moral character). Further, as a condition precedent to license renewal, more and more states are requiring lawyers to take part in continuing legal education (CLE) programs. The overriding goal of such court-imposed licensing requirements is to ensure initial and continuing competency and honesty of bar members.

EXAMPLE:

Can a state, Pennsylvania, allow admission on motion to the bar for practicing lawyers only from those states extending the same privilege to lawyers from Pennsylvania, but requiring bar exam passage to those from states that do not extend this reciprocity? Yes, and half the states do so. Such laws do not violate equal protection, the privileges and immunity clauses, or the dormant commerce clause. *Nat'l Ass'n for Advancement of Multijurisdictional Practice v. Berch*, 773 F.3d 1037, 1047 (9th Cir. 2014).

A bar applicant's moral character may be explored to protect the public and potential clients. It has been held that an individual's prior and current membership in subversive organizations, as well as an applicant's political beliefs, may be explored when a candidate is being considered for admission to the bar. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Civil Rights Research Counsel v. Wadmond*, 401 U.S. 154 (1971). A bar applicant's failure to repay debts, as well as the applicant's criminal convictions, may also be considered when evaluating whether to grant the applicant admission, among other relevant factors. *In re Anonymous*, 51 A.D.3d 1332 (3d Dep't 2008); see also *N.Y. Judiciary Law* § 90.

EXAMPLE:

After taking the Michigan bar exam, the Michigan bar authorities found the applicant, on the day of the bar exam, engaged in misconduct by writing past the "put down your pens" time limit. She was denied admission to the Michigan bar. Based on the foregoing, New York similarly denied her admission to the New York bar. *In re Anonymous*, 60 A.D.3d 1235 (3d Dep't 2009).

EXAMPLE:

After passing the New York bar exam, New York denied admission to the bar applicant based on his \$430,000 of delinquent school loans, coupled with absolutely no effort to make payments over a 20-year period, which indicated a lack of character and fitness. *In re Anonymous*, 61 A.D.3d 1214 (3d Dep't 2009).

Note that, under the Americans with Disabilities Act, a bar admissions application form may not inquire into *prior* mental illness or substance abuse, but only into an applicant's current condition; the current condition is what is relevant to the applicant's ability to practice law. *Anna Stolley Persky, A Matter Over Mind: State bars may probe applicants' behavior, but not mental health status*, *ABA Journal* (June 2014); *Questionnaire for Admission to the Rhode Island Bar*, 683 A.2d 1333 (R.I. 1996).

Many states' ethical rules require an admitted attorney to maintain a physical office within the state, and, indeed, attorneys have been reprimanded for failing to do so. *In re Kasson*, 660 A.2d 1187 (N.J. 1995). New York's statute requiring non-resident attorneys to maintain a New York

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office, Judiciary Law § 470, was recently upheld as not violating the Privileges and Immunities Clause. *Schoenefeld v. State of New York*, 1:09-CV-00504, NYLJ1202513835501, at *1 (N.D.N.Y. Sept. 7, 2011). Also, states cannot limit bar admission to in-state residents because such limitation would violate the Privileges and Immunities Clause of the U.S. Constitution, Art. IV § 2, cl. 1, which requires states to demonstrate that their residency requirement bears a close relationship to achieving a substantial state objective, a showing that has yet to be successfully made with respect to bar admission. *Virginia v. Friedman*, 487 U.S. 59 (1988); *New Hampshire v. Piper*, 470 U.S. 274 (1985).

QUERY:

Can a state require United States citizenship as a condition to admission to that state's bar?

No. Prohibiting the use of alienage classifications as a condition to gaining admission to the bar, the U.S. Supreme Court struck down permanent U.S. citizenship as a requirement for admission. Surprisingly, the Court did not choose to treat lawyers in the same manner as it treats teachers, members of the jury, and police officers, who are also intricately involved in a state's right to govern and who, the Court found, can be required to be U.S. citizens. *In re Griffiths*, 413 U.S. 717 (1973).

C. REGULATION AFTER ADMISSION

1. Discipline Generally

Every state has a disciplinary body that gathers evidence and holds hearings comporting with procedural due process requirements to evaluate attorney conduct and to enforce ethics regulations. The standard of proof in most jurisdictions is clear and convincing evidence. *Restatement (Third) of the Law Governing Lawyers Introductory Note, Reporter's Note; Nancy J. Moore, Mens Rea Standards in Lawyer Disciplinary Codes, Geo. J. Legal Ethics* 1, 12 n.1. Note, however, that New York State requires that a lawyer's unethical conduct be established only by a preponderance of the evidence. *In re Cappocia*, 272 A.D.2d 838 (1st Dep't 2000); *In re Seiffert*, 65 N.Y.2d 278 (1985).

Discipline may come in various forms. A lawyer found to have committed multiple or serious ethical violations may be suspended or disbarred, i.e., the court may rescind the lawyer's license to practice at its bar. To be reinstated to the bar after a long-term suspension or disbarment, a lawyer must demonstrate that (1) he or she has complied with the rules prohibiting the practice of law during the period of suspension or disbarment, and (2) he or she has been rehabilitated and, if readmitted, will no longer pose a threat to the public.

2. Grounds for Discipline

Attorneys may be disciplined for misconduct arising out of their practice of law or their private or business affairs. *A.B.A. Formal Op. 336* (1974). Indeed, it is professional misconduct for a lawyer to:

1. Violate, or attempt to violate, the Rules of Professional Conduct, or knowingly assist or induce another to do so. *Rule 8.4(a)*. Note that Rule 8.4(a) expressly provides that lawyers may not insulate themselves from discipline by violating the Rules through

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another person, e.g., by using a runner to refer legal business or by hiring a private investigator to contact a juror or a person the lawyer knows is currently represented by counsel in the lawyer's matter. *See also Rule 4.2 (governing lawyers' communications with persons represented by counsel).*

2. Commit criminal acts that adversely reflect on the lawyer's honesty, trustworthiness, or fitness as an attorney. Under Rule 8.4(b), in order to subject a lawyer to discipline for criminal acts, the attorney's illegal misconduct must bear directly on the attorney's fitness to practice law. *See Rule 8.4 cmt. 2 ("Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice").*

Offenses involving "violence, dishonesty, breach of trust, [willful failure to file an income tax return,] or serious interference with the administration of justice" indicate a lack of such character. *Id.* A pattern of repeated offenses, even ones of minor significance when considered individually, may indicate indifference to legal obligations and trigger discipline. *Id.* Offenses concerning matters of personal morality, such as adultery and comparable offenses, however, have no specific connection with fitness to practice law. *Id.*

EXAMPLE:

An attorney's *negligent* failure to file a tax return as a result of forgetfulness or procrastination probably does not constitute grounds for discipline, but *willfully* failing to file a tax return or knowingly filing a false return reflects adversely on the lawyer's fitness as an attorney. *Attorney Grievance Com'n v. Casalino*, 644 A.2d 43 (Md. 1994).

Keep in mind that, when a lawyer is convicted of criminal conduct (by the prosecution proving guilt beyond a reasonable doubt), the lawyer may not relitigate issues of guilt at a subsequent disciplinary hearing. On the other hand, a lawyer acquitted of criminal charges, is not beyond the grasp of a disciplinary committee because the standards of proof are different in both proceedings, i.e., the fact that the People were unable to prove guilt beyond a reasonable doubt does not preclude a disciplinary committee from proving misconduct by clear or convincing evidence or by a preponderance of the evidence. *See In re Cassidy*, 268 A.D. 282 (2d Dep't 1944), *aff'd*, 296 N.Y. 926 (1947).

3. Engage in dishonesty, fraud, deceit or misrepresentation. *Rule 8.4(c)*. This section applies regardless of how or where the conduct occurs -- even if the conduct occurs in another state or when the lawyer is not acting in his capacity as a lawyer. *See In re Rhodes*, 301 A.D.2d 190 (4th Dep't 2002).
4. Engage in conduct to corrupt or obstruct the administration of justice. *Rule 8.4(d)*. This section usually (although not always) refers to the attorney's conduct during litigation -- e.g., paying a witness to disappear, submitting false affidavits or subornation of perjury.
5. State or imply an ability to improperly influence a governmental agency or public official, or to achieve results by means that violate the law or Rules of Professional Conduct. *Rule*

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8.4(e). In that regard, it is professional misconduct for an attorney to assert or imply that he or she can influence a tribunal or the outcome of a case, e.g., because the lawyer is a legislator, politician, or former court employee. It does not matter whether the assertion is true or false or whether the attorney even attempts to exert improper influence; creating the mere appearance of impropriety – including alleging an ability to influence the administration of justice – constitutes misconduct.

6. Knowingly assist a judge or a judicial officer in conduct that violates the Code of Judicial Conduct or other law. *Rule 8.4(f)*.
7. Engaging with harassment or discrimination *while engaging in the practice of law*. “It is professional misconduct for a lawyer to . . . (g) harass or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in *conduct* related to the practice of law.” *Rule 8.4(g)*. This covers a broad range of conduct “related to the practice of law including the management of a law firm and while at business or social activities related to an attorney’s practice including social events and professional conferences.” Hopefully, gone are the days when an attorney refers to another lawyer as “honey” or “darling.” Such sexist remarks are “subject to discipline if they occur within the expanded definition of “workplace.”

Beyond the specific forms of professional misconduct enumerated in Rule 8.4, lawyers are generally subject to discipline for a variety of conduct reflecting adversely on the lawyer’s fitness to practice law. For example, a lawyer may be subject to discipline if the lawyer engages in a sexual relationship with a client the lawyer is representing. Keep in mind, however, that a consensual sexual relationship is not proscribed if the relationship predated the legal representation. *Rule 1.8(j)*.

D. MAINTAINING PROFESSIONAL STANDARDS - PEER RESPONSIBILITY

1. Reporting Misconduct - The “Squeal Rule”

Because lawyers are usually in the best position to witness the unethical conduct of a judge or another lawyer, Rule 8.3 imposes an affirmative duty to report certain known ethical violations of other lawyers. If the reporting would require revealing confidential information protected by Rule 1.6, which pertains to confidentiality of information relating to the client’s representation, then the lawyer is not obligated to disclose the information. *Rule 8.3(c)*. If the lawyer wishes to make the disclosure anyway, he or she must first obtain the client’s consent. *Rule 8.3 cmt. 2 (“A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client’s interests.”)*. If a lawyer has unprivileged knowledge (more than a mere suspicion) that another lawyer or judge has committed an ethical violation, that lawyer has a duty to report the misconduct. A lawyer need not report every impropriety, but must only report another lawyer’s misconduct which violates the Rules and “raises a substantial question” as to that lawyer’s “honesty, trustworthiness or fitness” as a lawyer. *Rule 8.3(a)*. Similarly, a lawyer must report conduct in violation of the Code of Judicial Conduct which raises a substantial question as to a judge’s fitness for office. *Rule 8.3(b)*.

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A lawyer retained to defend another lawyer accused of professional misconduct is exempt from the mandatory reporting requirement. Likewise, the Rules do not require a lawyer to report information of misconduct learned while participating in an approved lawyer assistance (drug or alcohol) program. *Rule 8.3(c); see also Rule 1.6*. Information learned under such circumstances is protected from disclosure by the attorney-client privilege.

In addition to the duty of a lawyer to report certain conduct pursuant to Rule 8.3, discussed just above, a lawyer has a duty to report the following information to a tribunal or other authority empowered to investigate or act on such violations:

1. Information, otherwise protected as a secret or confidence, that the lawyer “knows” [not “believes”] to be false which clearly establishes that the client has committed a fraud on the court. *Rule 3.3; see also Rule 3.3 cmt. 9 (“A lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact. [Note, however, that] a lawyer’s knowledge that evidence is false . . . can be inferred from the circumstances”).*
2. Improper jury contact by another attorney. *See Rule 3.5.*
3. A third person’s commission of or intent to commit fraud on a tribunal. *Rule 3.3(b).*

Note that under the Code of Judicial Conduct, a judge also has an affirmative duty to report violations that raise a substantial question as to a lawyer’s or another judge’s fitness. *CJC Rule 2.15*.

EXAMPLE:

A former associate knows that a partner in her old firm has overbilled clients, and misrepresented the services he could provide.

The associate who “knows” of this misconduct *must* report it if, in doing so, she does not reveal confidential client information. The New York State Ethics Committee also states the associate *may* report this to the partner’s affected clients. The Committee went on to note that if the associate did not “know” of this fact, but suspected such misconduct, then she *may* report that good faith belief to authorities if, in doing so, she does not reveal confidential client information, but under those circumstances she may not reveal the alleged misconduct to the partner’s clients. *N.Y.S.B.A. Formal Op. 854 (2011)*.

QUERY:

During the representation of a client, if a lawyer learns that opposing counsel has engaged in serious misconduct that should be reported as ethical misconduct, can the attorney use threats to report the other lawyer as leverage in settling the client’s matter?

ANSWER:

No. If an opposing counsel’s conduct raises a substantial question as to his or her honesty, trustworthiness, or fitness as a lawyer, the witnessing lawyer is ethically required to report the misconduct and may not ethically refrain from doing so, even if

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by so refraining the witnessing lawyer could obtain an advantage for the lawyer's own client. The reporting of misconduct should never be the subject of negotiations. *Rule 8.3(a)*; *A.B.A. Formal Op. 94-383 (1994)*; *In re Pyle*, 91 P.3d 1222 (Kan. 2004). It is unethical to merely threaten to report, because the duty to report misconduct under Rule 8.3 is nondiscretionary. *Rule 8.3 annot. (2015)*; *In re Kenny*, 217 P.3d 26 (Kan. 2009) (*in which an attorney was sanctioned for communicating to his clients' former attorney that his clients would file a complaint with the disciplinary committee unless the former attorney refunded the clients' fee*).

This scenario is similar to, but distinguishable from, a lawyer negotiating with a current client or former client to limit the client's right to report the lawyer to the disciplinary committee, which would be unethical as prejudicial to the administration of justice. *Rule 8.4(d)*.

The duty to report extends to misconduct committed by an attorney even though she does not practice law, if the attorney's conduct raises a substantial question about her honesty, trustworthiness, or professional fitness. *A.B.A. Formal Op. 04-433 (2004)*. Criminal activity is the most obvious reportable misconduct, even if the non-practicing lawyer has not been convicted or even charged with a crime. Note that if the reporting would reveal information relating to a client's representation, then Rule 1.6 dictates that the lawyer must obtain the client's informed consent before making the report.

2. Lawyer's Duty of Supervision

a. Generally

Just as a partner is jointly and severally liable for the torts of other partners and partnership employees, the lawyer (i.e., partner or lawyer with managerial or supervisory authority) is vicariously responsible, ethically, to make reasonable efforts to ensure that the conduct of the other attorneys, paralegals, and employees in the firm conform to the Rules of Professional Conduct. These efforts include establishing ethics committees or encouraging the use of CLE or bar association ethics hot lines. While Rule 8.3 imposes a duty to report known misconduct, Rules 5.1 and 5.3 go further and require all supervising lawyers, including prosecutors, to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct" and that all nonlawyers' conduct "is compatible with the professional obligations of the lawyer." *Rules 5.1(a) & 5.3(a)*. *ABA Formal Op. 467 (2014)*. Thus, a lawyer's failure to supervise an associate or employee may be a basis for discipline, e.g., a failure to supervise another partner's corrupt billing practice. *In re Fata*, 22 A.D.2d 116 (1st Dep't 1964), *leave to appeal denied*, 15 N.Y.2d 487 (1965), *cert. denied*, 382 U.S. 917 (1965); *Moore v. State Bar*, 396 P.2d 577 (1967).

This supervisory duty requires the establishment of office-wide ethics policies to address such issues as confidential obligations, to detect and resolve conflict of interest issues, as well as ethical obligations involving pretrial disclosure of evidence. The supervisory lawyer must also ensure that subordinate lawyers (including prosecutors) have been adequately trained to comply with these ethical obligations. *ABA Formal Op. 467 (2014)*.

Rule 5.1(c) imposes vicarious disciplinary liability upon a lawyer for ethical violations occurring in the firm if the lawyer knew or reasonably should have known of those violations and either ordered, ratified, or, as a partner or supervising attorney, did not take prophylactic measures

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to prevent, avoid, or correct that conduct and its consequences. Thus, for example, if a supervising attorney knows that a subordinate has made a material misrepresentation to an opposing party or to the court, then the supervisor has a duty to correct the resulting misrepresentation. Worth noting here is Rules 5.1 and 5.3s' obvious reluctance to extend ethical vicarious responsibility to the supervising attorney for every act of the attorney's subordinates. Ethical responsibility in this context is imputed exclusively in instances where the supervisor has an active hand in the violation – either by specifically ordering or ratifying the behavior, or by knowingly ignoring the behavior to the detriment of client interests. *Rules 5.1 & 5.3; see also Jonathan Putnam, Catering to Our Clients: How In re Cater Exposes the Flaws in Model Rule 5.3—and How They Can Be Solved, 19 Geo. J. Legal Ethics 925, 927 (2006).*

One way a law firm can ensure that the lawyers in the firm comply with the Rules of Professional Conduct is to create the position of in-house ethics counsel, available to assist lawyers in the firm to conform to ethical standards. *Rule 5.1 cmt. 3.* When a lawyer in the firm consults with the in-house ethics counsel, client consent is not required and the consultation does not create a per se conflict of interest between the firm and the client, unless the primary goal of the consultation is to protect the lawyer or the firm from the consequences of the consulting lawyer's prior misbehavior. *A.B.A. Formal Op. 08-453 (2008).*

If, based on the consulting lawyer's prior misconduct, the consulting lawyer's representation will be limited, then under Rule 1.10 (which also refers to Rules 1.7 and 1.9), the lawyer and the firm will be disqualified unless the firm reasonably believes that other lawyers in the firm can competently and diligently represent the client, *and* the client waives the individual lawyer's disqualification.

The in-house ethics counsel can report the misconduct to higher authorities in the firm, if necessary, to prevent harm to the firm. *Rule 1.13(b); see also Rule 1.13 annot. (2015) (under the heading "In-House Lawyers: Lawyers Who Are Also Employees or Shareholders").* The information can be disclosed *outside* the firm if it is illegal conduct committed by the consulting lawyer that could significantly harm the firm, subject to the firm's consent and the client's consent. *Rule 1.13(c); see also Rule 1.13 annot., at 242 (2015) (under the heading "Subsection (c): 'Reporting Out'").*

If a lawyer's mental impairment (e.g., alcohol or drug abuse, as well as Alzheimer's disease) materially impairs client representation, rendering the lawyer unable to represent clients competently and diligently, yet the lawyer continues to practice, a report to the proper disciplinary authorities is required. Thus, law firms have an affirmative duty to take "reasonable steps to ensure the impairment of a firm member will not harm clients or cause violations of the Rules." *A.B.A. Formal Op. 03-429 (2003).* Simply observing another lawyer or a judge who has become intoxicated at a social event does not trigger the duty to report; there must be actual knowledge of material impairment to client representation or judicial duty. This obligation to report violations of an impaired lawyer is not fulfilled or excused when the impaired lawyer voluntarily leaves the firm or is fired. Indeed, a duty to report arises when a lawyer knows that another lawyer who is not a member of her own firm may have a mental impairment that is materially impairing the lawyer's ability to effectively represent clients. *A.B.A. Formal Op. 03-431 (2003).* If client confidentiality will be disclosed in the reporting, Rule 1.6 requires the client's informed consent to make the report.

A senior lawyer is prohibited from engaging in unethical conduct through a junior lawyer or nonlawyer employed by or associated with the firm. *Rules 5.1(c)(1), 5.3(c)(1), and 8.4(a).* Note

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also that an attorney is not immune from disciplinary action just because the attorney's ethical transgression was ordered by a senior attorney in the firm. Most law students reading this text will not initially be supervising lawyers or partners when they enter the professional work force, but, rather, will be supervised by others. Be advised: the fact that a novice lawyer is told to do something unethical ("following orders") is not an excuse and will not provide a defense to a neophyte lawyer charged with engaging in unethical conduct. *Rule 5.2(a); Restatement (Third) of the Law Governing Lawyers § 12*. First and foremost is the lawyer's duty to comply with the rules of ethics – a duty that binds all lawyers, including newly admitted ones. Thus, if a junior lawyer in a firm is told by a senior partner to pad the client's legal bill by adding hours to the junior lawyer's time sheet, the junior lawyer's duty is to disregard this instruction and to truthfully and ethically report hours worked. New lawyers should also remember that they have an affirmative duty to report any substantial ethical violations (unless knowledge of such violation is privileged) of supervising lawyers in the firm. *Rule 8.3; see A.B.A. Informal Op. 1203 (1972) (requiring a junior attorney to report unprivileged knowledge of a disciplinary rule violation)*.

If the directed conduct is not clearly unethical (i.e., it's a "close call") and the conduct is a reasonable resolution of an arguable ethical question, then the supervised attorney who was ordered to so act is not subject to discipline, even if his or her conduct is later deemed ethically impermissible by a disciplinary body or tribunal. *Rule 5.2(b)*.

As discussed above, the Rules impose on supervising and subordinate lawyers a similar duty of reasonable supervision and vicarious disciplinary liability for paralegals, secretaries, and other nonlawyer assistants regarding their compliance with the ethical rules. *Rule 5.3*. For example, a lawyer would be subject to discipline for the knowing unlicensed practice of law by a nonlawyer employed by the firm.

EXAMPLE:

After Attorney Alpha discovered that his highly competent secretary (who had signing privileges on his law office checking account, but not his escrow account) had embezzled \$1,000, Alpha did not fire her because she repented and swore she would never do it again. During the next four months, Alpha did not check his bank statements. If the secretary embezzled money from either Alpha's law office checking or escrow account, Alpha would be subject to discipline for failing to properly supervise his secretary.

The A.B.A. has upheld as ethical a law firm's use of temporary lawyers provided by a temporary lawyer service, but notes that the rules relating to conflicts of interest and confidentiality apply to such arrangements. *A.B.A. Formal Op. 88-356 (1988)*. In that regard, the temporary lawyer may be considered an associate of the firm for purposes of imputed disqualification. Thus, the law firm should supervise and screen temporary lawyers.

Temporary lawyers frequently are hired through placement agencies, which often are run and owned by nonlawyers. These agencies charge a fee based on a percentage of the compensation paid to or billed out by the temporary lawyer. This is permissible and is not a violation of Rule 5.4's prohibition against sharing legal fees with a nonlawyer. *A.B.A. Formal Op. 88-356 (1988); see also Florida Bar Op. 88-12 (1988); K.B.A. Advisory Op. E-328 (1988); Ass'n of the Bar of the City of New York Formal Op. 1988-3-A (1988)*.

b. Outsourcing

Outsourcing of legal services, especially to India, is now a common practice. The law firm doing the outsourcing has an ethical obligation to ensure supervision and competence of the work provided by those attorneys. “Where the relationship between the firm and the individual performing the service is attenuated, as in a typical outsourcing relationship, no information protected by Rule 1.6 (confidences or secrets) may be revealed without the client’s informed consent.” *A.B.A. Formal Op. 08-451 (2008)*. Thus, a lawyer should ordinarily first obtain client consent before retaining or contracting with other lawyers outside the lawyer’s own firm to assist in providing legal services to a client.

Outsourcing legal and nonlegal support services includes “the engagement of a group of foreign lawyers to draft patent applications or develop legal strategies and prepare motion papers in U.S. litigation.” *Id.* It can also include hiring a copying service to reproduce documents, hiring a document management service to scan and create a large database, or hiring contract attorneys to review documents. *Id.*

The critical ethical duty of the law firm outsourcing work is to ensure and oversee that legal services are rendered competently. *Id.*

3. Choice of Law for Professional Misconduct

In 2002, an amendment to the Rules changed the choice of law focus from the jurisdiction in which the lawyer is licensed to the jurisdiction in which the professional misconduct occurred or, if the predominant effect of the misconduct was in a different jurisdiction, the rules of the jurisdiction in which the misconduct had its predominant effect. *Rule 8.5(b)(2)*. Thus, a lawyer may be sanctioned in the state where the misconduct occurred, regardless of whether the lawyer is licensed to practice law there.

When evaluating a lawyer’s misconduct that is related to a matter pending before a tribunal, the ethics rules of the jurisdiction in which the tribunal sits will apply, unless the rules of the tribunal provide otherwise. *Rule 8.5(b)(1)*. Thus, a lawyer’s conduct in connection with a matter pending in a tribunal is subject to a single set of rules of professional conduct (i.e., the ethics rules of the presiding court).

When evaluating lawyer misconduct not related to a matter pending before a tribunal:

1. apply the ethics rules of the jurisdiction where the conduct occurred; or
2. if the predominant effect of the conduct is in a different jurisdiction, apply the ethics rules of that jurisdiction to the conduct, regardless of whether the lawyer was admitted in that jurisdiction. *Rule 8.5(b)(2)*.

A lawyer may simultaneously be subject to the ethics rules and regulations of two jurisdictions. *Rule 8.5 cmt. 2*. For example, a lawyer engaged in the unauthorized practice of law is subject to the disciplinary authority and rules (including choice of law rules) of that jurisdiction, as well as of the jurisdiction in which the lawyer is licensed to practice. When a lawyer faces uncertainty as to which jurisdiction’s ethics rules govern the lawyer’s conduct, the lawyer shall not be subject to

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discipline if the lawyer's conduct conforms to the ethics rules of the jurisdiction in which the lawyer reasonably believed the lawyer's conduct would have its predominant effect. *Rule 8.5(b)(2)*.

E. MISREPRESENTATIONS

The Rules prohibit lawyers from making misrepresentations or engaging in fraud or deceit. Rule 8.4(c) provides that, whether or not the lawyer is engaged in representing a client, it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Of course, lawyers are also prohibited from perpetrating such conduct through another. *Rule 4.1 cmt. 1*.

Rule 3.3(a)(1) provides that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal (a judge or arbitrator) or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer" In 2002, the ABA removed the "materiality" requirement from the first prong of the rule, thus prohibiting lawyers from knowingly making *any* false statement of fact or law to a tribunal whatsoever. *Rule 3.3(a)(1)*. This rule does not apply to lawyer's statements in mediation or a negotiation among parties. However, it does apply when the lawyer is representing a party in an ancillary proceeding being conducted "pursuant to the tribunal's adjudicative authority," such as a deposition. *Rule 3.3 cmt. 1*. Rule 1.0(m) expressly provides that a "tribunal" includes "a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity" wherein, after hearing evidence, it will render a binding decision "directly affecting a party's interests in a particular matter."

Rule 4.1(a) prohibits a lawyer from "knowingly . . . making a false statement of material fact or law to a third person" in the course of representing a client.

When a lawyer is negotiating to settle a personal injury case or on the purchase price of a client's transactional matter, then there are some forms of "exaggeration, posturing or puffing" such as overstating or understating a client's bottom line that are ethically permissible. *ABA Formal Op. 439*. Here lawyers must distinguish "two types of representations . . . (1) statements that constitute impermissible misrepresentations of material fact upon which the opposing party may rely (see 1 to 4 below) and (2) statements that constitute acceptable "exaggeration, posturing or puffing in negotiations." *Cal. State Bar, Formal Op. 2015-194*.

Impermissible misrepresentations of material fact include:

1. In a personal injury claim, when plaintiff's counsel, Alpha, was unable to locate any witnesses, a statement that "Alpha will have no difficulty proving the defendant was texting while driving because an eyewitness with excellent credibility would provide undisputed testimony on the subject;
2. Falsely inflating the plaintiff's annual salary by \$25,000 to increase the client's lost wages damages claim;
3. Defense counsel's false statement that defendant's liability coverage was only \$50,000 when it was actually \$500,000; and
4. Defense counsel's false statement that if the defendant loses at trial, she will declare

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bankruptcy, when the lawyer knows the client is not eligible for bankruptcy. *Id.* See also *Chapter VII(D) infra*.

Keep in mind that rules discussed just above in this section speak of lawyer misrepresentations to a court, to a third person while representing a client, and to a third person even when the lawyer is not before a court or representing a client.

EXAMPLE:

A prosecutor falsely told a judge that he was unaware of the whereabouts of a witness to a murder even though, in fact, he had interviewed the witness four days earlier. When the truth was revealed years later, the attorney was suspended from the practice of law for three years for making a knowing misrepresentation to the court. *In re Stuart*, 22 A.D.3d 131 (2d Dep't 2005).

Some courts have held that lawyers who assist and “ghostwrite” pleadings for pro se parties are engaging in misrepresentation to a tribunal in violation of Rule 3.3(a)(1). “It is elementary that pleadings filed *pro se* are to be interpreted liberally.” *Johnson v. Bd. of County Com'rs*, 868 F. Supp. 1226, 1231 (D. Colo. 1994); see also *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972); *Duran v. Carris*, 238 F.3d 1268, 1272 (10th Cir. 2001). “We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature. In fact, we agree with the New York City Bar’s ethics opinion [1987-2] that ‘an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney’s assistance to the court upon filing.’” *Duran*, 238 F.3d at 1273 (10th Cir. 2001). On the other hand, the A.B.A. has held that there is no duty to disclose ghostwriting absent an affirmative statement by the client to the court that the documents were prepared without legal assistance. *A.B.A. Formal Op. 07-446* (2007). Federal courts, except for the Second Circuit, have uniformly condemned ghost writing. 28 *Geo. J. Legal Ethics* 451, 461 (2015). Of the twenty-four states that have addressed the issue, the states are just about evenly divided. *Id.* at 286. However, almost all the federal and state opinions opposing ghostwriting were issued prior to 2007 when the ABA issued its opinion favorable to ghostwriting. *Id.* at 290. In light of the A.B.A.’s 2007 opinion, and other recent ethics opinions permitting various forms of ghostwriting, “it is possible that the courts and bars that previously disapproved of attorney ghostwriting of *pro se* filings will modify their opinion of that practice.” *In re Fengling Liu*, 664 F.3d 367 (2d Cir. 2011).

F. UNAUTHORIZED PRACTICE OF LAW

1. Unauthorized Practice

The rules prohibiting the unauthorized practice of law are designed to protect the public. The rules are intended to ensure that legal matters will be handled competently, with integrity, and by those who are subject to the regulations imposed upon them by the local jurisdiction.

The unauthorized practice of law in any jurisdiction is the practice of law by anyone not licensed in that jurisdiction. Such unauthorized practice may be committed by lawyers and nonlawyers alike. For example, the nonlawyer (e.g., a law school graduate who has yet to be admitted to the bar) who holds himself out as a lawyer or makes submissions in court, as well as the lawyer who crosses a state line and practices law in a jurisdiction in which she is not admitted to practice, both have engaged in the unauthorized practice of law. The unauthorized practice of law

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also occurs when a lawyer continues to practice law in a jurisdiction after his or her authority to practice has lapsed due, for example, to noncompliance with CLE requirements, nonpayment of mandatory bar dues, a switch in bar status from “active” to “inactive,” or a disbarment or suspension.

A lawyer shall refrain from practicing law or giving legal advice within the geographic confines of a jurisdiction where he or she is not admitted to the bar, even though the lawyer could give the same advice into that jurisdiction by phone, letter, e-mail, or fax while remaining in the jurisdiction where the attorney is admitted. When a lawyer renders legal advice from outside into a jurisdiction in which the lawyer is not admitted, the lawyer should advise the client that the lawyer is not admitted to the foreign jurisdiction’s bar. *Condon v. Superior Court*, 64 Cal. Rptr. 2d 789 (Cal. Ct. App. 1997).

Because lawyers are considered “officers of the court,” a violation of the unauthorized practice rules is punishable as contempt of court under the state’s police power, and such conduct constitutes a misdemeanor in approximately 38 states. *Deborah L. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *Stanford L. Rev.* 1, 40 (1981); *New York Judiciary Law §§476-a*, 478, 484. Lawyers also are required to refrain from knowingly aiding anyone who is not a member of the bar in the unauthorized practice of law.

2. Multijurisdictional Practice of Law

A lawyer shall not practice law in a jurisdiction in which the lawyer is not authorized to practice, and shall not assist another in doing so. *Rule 5.5(a)*. In order for an attorney in State X to practice law in State Y, generally that attorney must apply for admission to the bar of State Y or be admitted on a motion pro hac vice for a particular State Y court case. It has been held that where an attorney violates this unauthorized practice of law rule, the attorney may be precluded in State Y from recovering legal fees or commencing a suit in quantum meruit for attorney’s fees. *Spivak v. Sachs*, 16 N.Y.2d 163 (1965).

Since the modern practice of law so frequently crosses jurisdictional boundaries, the A.B.A. has created several “safe harbors” (now adopted in 44 out of 50 states including New Jersey, Connecticut and Pennsylvania, but not New York), for a lawyer who is admitted and in good standing (not disbarred or suspended) in another jurisdiction within the United States. See http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf. Such a lawyer may provide legal services on a “**temporary basis**” in a jurisdiction in which the lawyer is not admitted to that bar:

1. Where the lawyer is preparing for a proceeding pending before a tribunal in which she is admitted or reasonably expects to be admitted pro hac vice (e.g., where the lawyer is going into a state when the lawyer is not admitted to take a deposition for litigation ongoing in the state where the lawyer is admitted). *Rule 5.5(c)(2)*. Likewise, the lawyer’s associates who are not admitted to the bar in that state can do legal research, interview witnesses and clients, attend meetings, take depositions, and inspect documents in that jurisdiction where they are not admitted. *Rule 5.5 cmt. 11*.
2. Where the matter where the lawyer not admitted is “reasonably related” to a pending arbitration or mediation in the lawyer’s state of admission (e.g., taking depositions in a jurisdiction where the lawyer is not admitted). *Rule 5.5(c)(3)*.

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3. Where the lawyer associates herself in the particular matter with a local lawyer admitted in the jurisdiction provided the latter attorney “actively participates in the matter.” Rule 5.5(c)(1).
4. In transactional matters arising out of and related to the lawyer’s practice in a jurisdiction where the lawyer is admitted. Such lawyers do not appear before tribunal or agencies. This allows a client to retain the same attorney for multiple related matters, incidental to the lawyer’s home state practice, that cross state lines. Rule 5.5(c)(4).

Further, there are two exceptions that permit a lawyer not admitted in the state to provide legal services, not just on a temporary basis:

1. Where the lawyer’s services are provided to the lawyer’s employer, as in the case of in-house corporate or government lawyers. Such lawyers may provide legal services to their employers in states where the lawyers are not admitted to practice law provided: (1) the legal services are provided to the lawyer’s employer or the employer’s organizational affiliates and are not services that would otherwise require pro hac vice admission, or (2) the legal services are authorized by federal law or the jurisdiction’s state law. Rule 5.5(d)(1) & (2).

Foreign lawyers “who are otherwise lawfully practicing under the laws of a foreign jurisdiction can now register with a state to become in-house counsel. Rule 5.5.

2. Where federal law permits lawyers unlicensed in a state to practice, such as before federal agencies or federal courts. Under the Supremacy Clause of the U.S. Constitution, federal law prevails over inconsistent state laws. See *Sperry v. State of Florida*, 373 U.S. 379 (1963). The exception, under Rule 5.5(d)(2), derives from the U.S. Constitution.

Now be careful when next year, you get admitted to practice in New York State. Can you go over to New Jersey even though not admitted to the New Jersey bar, and appear in the federal district court? Surprisingly, no, because that court’s local rule requires lawyers to be admitted to practice in New Jersey. In July 2016, this rule was upheld by the Third Circuit Court of Appeals. “During the past 18 years, [since 1998], the [federal] Judicial Conference has not entertained any new proposals to adopt any changes in the uniform district court bar admission. [Such a renewed request] would again be likely to face substantial resistance.” *The Federal Lawyer* at 30, 31 (Sept. 2016).

Under the Federal Administrative Procedure Act, in order to practice and appear before a federal agency, a lawyer need only be admitted to some state bar, not necessarily the bar of the state in which the federal agency’s proceeding takes place. 5 U.S.C. § 500 *et seq.* Thus, a lawyer can practice law before a federal agency or in a federal court to which the lawyer has been admitted to practice even if the lawyer is not admitted in the state where the federal agency or court sits. “Thus, while government attorneys [as well as private attorneys] must abide by the ethical codes of conduct of each state in which they perform their services, they do not have to be licensed by those states to practice law” before federal regulatory agencies. *Augustine v. Dep’t of Veteran Affairs*, 429 F.3d 1334 (D.C. Cir. 2005). Accordingly, a lawyer with an intellectual property practice (trademark, copyright, or patent law) can practice law in a state where not admitted. Rule 5.5(d).

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Remember that a lawyer engaged in the practice of law in a jurisdiction in which the lawyer is not authorized to practice is subject to the disciplinary authority and rules of that jurisdiction, as well as the jurisdiction where the lawyer is licensed to practice. *Rule 8.5(a)*. Also, remember that Rule 5.5, except in the case of federal practice or practice as in-house counsel, does not permit a lawyer who is not licensed in a particular state to maintain an office in that state, to hold herself out as licensed in that state, or to otherwise establish a “systematic and continuous presence” in that state. *Rule 5.5 cmt. 4*.

Also, four jurisdictions (including New Jersey and Connecticut) require the out-of-state lawyer to first register and pay a fee before the lawyer can limitedly practice in these states. *A.B.A. Comm. on Ethics 20/20, For Comment: Issues Paper Concerning Multijurisdictional Practice (2011)*, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/mjp_issues_paper.authcheckdam.pdf. As of April 20, 2011, New York allows out-of-state in-house attorneys (for \$375) to provide legal advice to their employers. *22 N.Y.C.R.R. Part 522*.

So, in a nutshell, when can a lawyer admitted in State X ethically go into State Y and practice law on a temporary basis under Rule 5.5? When:

1. the lawyer is admitted pro hac vice to a State Y court proceeding or reasonably expects to be admitted pro hac vice in that proceeding;
2. the lawyer participates in the State Y proceeding with a State Y attorney who actively participates in the proceeding;
3. the lawyer’s services involve an alternative dispute resolution proceeding in State Y which is related to the lawyer’s practice back in State X; or
4. the legal services in State Y are reasonably related to the lawyer’s State X-based practice.

Also, on a regular (not “temporary”) basis, the State X attorney can regularly practice law in State Y:

5. Under federal law, before federal courts and federal agencies; or
6. as in-house corporate counsel on matters that do not involve appearing in State Y courts. *Rule 5.5(d)*.

3. “Practice of Law” Defined

The practice of law concerns the rendition of services to others that call for the professional judgment of a lawyer. The practice of law includes the preparation of legal instruments of all kinds and, in general, all advice given to clients and all actions undertaken for them in matters connected with the law. *In re Schwerzmann*, 408 N.Y.S.2d 187 (N.Y. Ct. Jud. 1978).

Courts frequently determine what constitutes the practice of law by evaluating:

1. Whether the activity is one traditionally performed by lawyers (*State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76 (1961)); and

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2. Whether the activity requires legal skills or knowledge beyond that of the average nonlawyer. *Baron v. City of Los Angeles*, 86 Cal. Rptr. 673 (1970).

Exceptions to the prohibition of the unauthorized practice of law are made for self-representation and under local court rules for law students and paralegals under the direct or indirect supervision of an attorney (*see* section 5. Law Students and Paralegals, *infra* p. 15).

4. Delegation of Authority

A lawyer “may employ nonlawyers to do any task . . . except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings . . . so long as it is [the lawyer] who takes the work and vouches for it to the client and becomes responsible to the client.” *A.B.A. Formal Op. 67-316* (1967). Thus, a lawyer may properly delegate tasks to clerks, law students, secretaries, and paralegals, provided the lawyer supervises the work and retains ultimate responsibility for the work product. Lawyers with managing authority over other lawyers and nonlawyers in the firm shall make reasonable efforts to ensure that all supervised nonlawyers and lawyers act ethically and in accordance with professional obligations. *Rules 5.1 & 5.3*.

A nonlawyer-employee of a law firm does not engage in the unauthorized practice of law by doing preparatory work on a case, investigating, interviewing clients in preparation for and in advance of a lawyer’s conference, or performing similar functions that permit the employer-lawyer to advance the representation subject to the lawyer’s own examination, approval, or additional work. *See Rule 5.5 annot. (2015) (under the heading “Using Nonlawyer Legal Assistants”)*. Such delegation enables a lawyer to render legal services more economically and efficiently. However, legal assistants may not perform those functions reserved exclusively for lawyers; in that regard, they “may never perform services which involve the exercise of the professional judgment of a lawyer [and may not advise clients with respect to their legal rights].” *N.Y. County 641* (1988). Thus, legal assistants may conduct legal research, prepare memoranda of law, prepare all legal papers, interview prospective witnesses and, in general, perform all services that do not require the exercise of independent professional judgment or participation, as long as they are subject to the continuing supervision of a lawyer. *N.Y. County 641* (1988); *N.Y. City 884* (1974); *N.Y. State 44* (1967); *N.Y. City 78* (1927-28).

The New York State Bar Association’s Unlawful Practice of Law Committee has held that an attorney’s nonlawyer employee (clerk or paralegal) may attend a real estate closing without the attorney. *N.Y.S.B.A. Ethics Op. 667* (1995). The nonlawyer’s responsibility, however, must be limited to those functions not involving independent discretion or judgment, and his or her unsupervised attendance is permissible only where the documents were prepared previously and reviewed by a lawyer and the only remaining tasks are the signing of the documents and the closing adjustments. In addition, the client must be made aware that the nonlawyer will be the sole representative of the client at a closing, and that, because of the possibility that documents may have to be revised or negotiated at the time of the closing, an attorney must always be available to the nonlawyer by telephone. Note, however, a paralegal may not supervise the execution of a client’s will or take a deposition. *N.Y. Judiciary Law §§ 478, 479, 484, & 486; cf. Spivak v. Sachs*, 16 N.Y.2d 163 (1965).

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5. Law Students and Paralegals

In 47 of the 50 states, law students are now permitted to participate in criminal and civil cases under local state rules and regulations. They are permitted to prepare legal papers and legal briefs and to appear in court under the direct supervision of an attorney. See *People v. Perez*, 24 Cal.3d 133 (1979); see also George L. Blum, *Propriety and Effect of Law Students Acting as Counsel in Court Suit*, 6 A.L.R. 6th 259 (2011).

Paralegals may present business cards identifying themselves as “legal assistants,” provided a lawyer supervises their work and is responsible for it. A paralegal may be listed on law firm letterhead, provided the letterhead indicates the paralegal’s nonlawyer status. *N.Y. County 673* (1989).

6. Do-It-Yourself Advice

“Do-it-yourself” legal guides for nonlawyers are a flourishing multi-million dollar business. Mr. Dacey’s 1965 book, *How to Avoid Probate!*, sold over 1.5 million copies.

Do-it-yourself kits, form books and secretarial services for nonlawyers are permitted. In New York, publishing legal texts which state the law generally and distributing legal forms (e.g., for divorce, probate, etc.) with instructions on how these forms should be filled out do not constitute the unauthorized practice of law. *In re N.Y.C. Lawyers’ Assn. v. Dacey*, 21 N.Y.2d 694 (1967); *State v. Winder*, 42 A.D.2d 1039 (4th Dep’t 1973); cf. *Bar v. Stupica*, 300 So.2d 683 (1974) (holding that selling do-it-yourself divorce kits does constitute providing legal advice).

A nonlawyer may not, however, advertise to the public that he or she will prepare, file or obtain releases for mechanic’s liens or engage in the practice of sending threatening letters to file mechanic’s liens for customers. Such activities have been held to constitute the practice of law. *Florida Bar Assn. v. Carmel*, 287 So.2d 305 (Fla. 1973); *Patricia Jean Lamkin, Sale of Books or Forms Designed to Enable Laymen to Achieve Legal Results Without Assistance of Attorney as Unauthorized Practice of Law*, 71 A.L.R.3d 1000 (1976).

In *North Carolina State Bd. of Dental Examiner’s v. FTC*, 135 S.Ct. 1101 (2015) the Supreme Court upheld the Federal Trade Commission’s antitrust claim against the North Carolina State Board of Dental Examiners, a panel dominated by dentists, for alleged anticompetitive efforts to prevent nondentists from offering teeth whitening service in the state. The Court held that “active market participants cannot be allowed to regulate their own market, free from antitrust accountability.” This case has warned state and local bar associations that their attempt to restrict what is allegedly the “practice of law” may very well be a restraint of trade in violation of antitrust laws. Three months after the Supreme Court’s decision, LegalZoom.com started a federal lawsuit against the North Carolina State Bar association alleging such monopolistic practices. The suit was quickly settled. The Washington State Bar Association recently suspended its bar association’s authority from issuing anticompetitive opinions in concern for antitrust liability of the committee members. This area, your authors suspect, is an area that the MPRE testers will purposely avoid.

7. Self-Representation by a Nonlawyer

The United States Supreme Court has held that the Sixth Amendment right to counsel affords a criminal defendant the right to self-representation. A pro se defendant cannot be required to use an

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attorney. *Faretta v. California*, 422 U.S. 806 (1975). Before the criminal court allows a defendant to proceed pro se, however, the court must conduct a searching inquiry into a criminal defendant's understanding of the right to be represented by counsel and the dangers of waiving that right before permitting the accused person to proceed pro se. *Faretta*, 422 U.S. at 835; *People v. Sawyer*, 57 N.Y. 2d 12, 21 (1982), cert. denied, 459 U.S. 1178 (1983).

A nonlawyer may practice law for the purpose of self-representation because such conduct only endangers that person. A lawyer who provides legal advice for a pro se party is not assisting another in the unauthorized practice of law. *Rule 5.5 cmt. 3*.

The courts have approved the right of incarcerated prisoners to seek advice from unlicensed "jailhouse lawyers." *Johnson v. Avery*, 393 U.S. 483 (1969); *Bounds v. Smith*, 430 U.S. 817 (1977); *Valiant-Bey v. Morris*, 620 F. Supp. 903 (D. Mo. 1985), dismissed, 786 F.2d 1168 (8th Cir. 1986). However, while a nonlawyer may represent himself or herself in court, he or she cannot represent another nonlawyer (even a close relative) or an entity, such as a trust or corporation.

8. Partnerships with Nonlawyers

A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership constitute the practice of law. *Rule 5.4(b)*. Thus, for example, a lawyer may not form a partnership with a certified public accountant to represent clients in federal tax matters because this is tantamount to sharing legal fees with a nonlawyer. To form such a partnership, the lawyer would have to withdraw from the practice of law and refrain from holding himself or herself out as a lawyer. *A.B.A. Informal Op. 1032 (1968)*. Note, however, that a lawyer who is also an accountant may practice both professions from the same office.

A lawyer may be retained by a collection agency, but he or she shall represent the individual creditors and not the agency. *A.B.A. Informal Op. 327 (1960)*. Any fee collected should be remitted directly to the creditor unless the lawyer is specifically authorized to remit the fee to the collection agency. Note that it is improper to permit a collection agency's employees to use an attorney's letterhead or legal forms. *A.B.A. Informal Op. 957 (1967)*. It is also improper to allow a collection agency to send out dunning letters on the lawyer's stationery. *See A.B.A. Formal Op. 68 (1932)*; see also *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996).

An attorney may not manage or actively participate in a collection agency's business if the business involves solicitation unless the lawyer withdraws from the practice of law. If the lawyer does not withdraw, he or she may only be an inactive shareholder in the corporate collection agency. *A.B.A. Informal Op. 225 (1960)*.

EXAMPLE:

Beth, an attorney, partnered with a nonlawyer in an "heir-locating" firm. The firm hired investigators to locate lost heirs in order to recover unclaimed bank deposits. Beth prepared and sent contracts to the located heirs, and Beth did all of the legal work, including that with respect to any probate proceedings necessary to have the respective heirs appointed executors or administrators.

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HELD:

Beth is impermissibly sharing legal fees with a nonlawyer, in violation of Rule 5.4(a), and forming a partnership with a nonlawyer where some of the activities of the partnership consisted of the practice of law, in violation of Rule 5.4(b). *See Utz v. State Bar of California, 21 Cal.2d 100 (1942)*. She is, therefore, subject to discipline.

9. Businesses Providing Law-Related Services

Today, lawyers and law firms are more and more frequently diversifying and establishing or buying into businesses that provide ancillary law-related services to clients. These services are related to and performed in conjunction with legal services that may properly be performed by nonlawyers. These businesses include entities providing the firm's clients with title insurance, financial planning, accounting, trust, tax preparation, escrow, and insurance investment services, as well as arbitration, lobbying, and environmental consulting.

A lawyer may engage in and own an interest in an ancillary business to perform services relating to the lawyer's legal services, e.g., an abstract company, title insurance company, liability and hazard insurance agency, investment service, or real estate brokerage. The lawyer is required to fully reveal the lawyer's interest in the business to the client and advise the client that the ancillary services are not "legal services" and, thus, are not protected by the attorney-client privilege. *See Rule 5.7*.

The "Ethics 2000" revision of Rule 5.7 renders irrelevant whether the law-related services are performed by support staff within the law firm or by a separate entity. To remove the aforementioned restrictions imposed by the Rules on law-related services, the lawyer must make clear to the client that the law related services are not subject to the benefits of the attorney-client relationship, e.g., the client's relationship with the attorney or business providing ancillary services will not be governed by the prohibition against representing others with competing (conflicting) interests, the obligation to protect the client's secrets and confidences, or the obligation to maintain professional independence. *Rule 5.7(a)(2)*.

Under Rule 5.7, when an attorney-client relationship exists with the person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a) (governing business transactions with clients). *Rule 5.7 cmt. 5; see Chapter IV E., infra*.

10. Disbarred Lawyers

A disbarred lawyer may not practice law during the period of disbarment. The scope of activities in which the disbarred lawyer may engage varies from state to state. Typically, a disbarred attorney is prohibited from meeting with and advising clients, as well as from handling or overseeing matters even from a distance. A disbarred or suspended attorney is, however, entitled to collect or share in a fee based on quantum meruit for the value of the lawyer's services rendered up to the moment of disbarment or suspension. *Padilla v. Sansivieri, 31 A.D.3d 64 (2d Dep't 2006)*.

For example, in New York, a lawyer may not employ a disbarred or suspended lawyer to work for a law firm or in any capacity related to the practice of law. N.Y. County 666. New York's Judiciary Law § 90(1) directs the Appellate Division to "command" every New York lawyer who is

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disbarred or suspended “to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another.”

G. SHARING LEGAL FEES WITH NONLAWYERS

A lawyer may not share a fee with a nonlawyer. *Rule 5.4*. For example, a lawyer may not share fees with a nonlawyer trustee in bankruptcy, a trustee of an estate, or with a lay patent agent even though the latter is permitted to appear before the U.S. Patent Office. *See A.B.A. Formal Op. 18 (1930)*. Whenever a lawyer acts in concert with a nonlawyer, he or she must immediately consider the issue of sharing fees with a nonlawyer.

Fee sharing with a nonlawyer is prohibited because it poses the possibility that the legal representation may be controlled, and the lawyer’s professional independence compromised, by a nonlawyer whose interest in earning profits may outweigh his or her concern for a client’s welfare and best interests. Thus, a nonlawyer may not own an interest in a law firm or have the managerial right to control a lawyer’s legal activities. Likewise, a nonlawyer cannot own shares of stock in a lawyer’s professional corporation and cannot be elected a partner in a law partnership. Thus, if a law firm needs an infusion of capital, it may not sell an interest in the law firm to a nonlawyer. It can, however, use the firm’s equipment and fixtures as collateral to secure a loan from a nonlawyer.

Attorneys have tried to disguise fee-splitting arrangements by hiring nonlawyers as employees whose wages are contingent on the amount of fees received from cases the employee has referred, or by work performed in generating a collected fee. Such conduct is improper. Likewise, a lawyer may not split a fee or share fees with a clerk, a paralegal, or even a law student who has passed the bar and whose admission is pending, even though the clerk, paralegal, or law student has worked extensively on a matter or even referred the matter to the law firm. *Rule 5.4(a)*; *see Philadelphia Bar Ass’n Ethics Op. 2001-7 (2001)*; *N.Y. State 302 (1973) (law students and law school graduates not admitted to the bar are deemed nonlawyers)*; *see also Rule 5.4 annot. (2015)*.

QUERY:

Can a lawyer who is admitted only in State X refer a client to a lawyer in State Y and share part of the fee earned in State Y?

ANSWER:

Yes, provided the total fee is reasonable and the fee division is either in proportion to the work performed or both lawyers are jointly and severally responsible for the representation. Further, the client must agree to the arrangement, including the share each lawyer will receive, and the agreement must be confirmed in writing. *Restatement (Third) of the Law Governing Lawyers § 47 cmt. d*; *Rule 1.5(e)*.

QUERY:

Could Walmart or H&R Block open law offices staffed by salaried lawyers in shopping centers across the country?

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ANSWER:

No. Remember – Rule 5.4(a) provides that a lawyer or law firm shall not share legal fees with a nonlawyer. A law firm or a professional corporation cannot be controlled by nonlawyers.

QUERY:

If a corporation has a salaried, full-time in-house counsel, can it rent out its lawyer's services to third parties at a fee higher than cost?

ANSWER:

No. This profitable rental of the in-house counsel's services would constitute corporate interference with the lawyer's exercise of independent professional judgment as to what course to take, how to pursue it, and the fee to be charged. *A.B.A. Formal Op. 95-392 (1995)*.

Likewise, if in-house counsel of a corporate party is awarded attorney's fees by the court, the corporation employing the in-house lawyer cannot take more of the awarded fee than the corporation's actual cost (i.e., its financial outlay) for the attorney's services; anything more would result in a profit to the employer amounting to improper fee-splitting. Any fee awarded over and above the corporation's cost must go to the lawyer who performed the work. *A.B.A. Formal Op. 95-392 (1995)*.

Note that the preceding opinion distinguishes itself from A.B.A. Formal Opinion 93-374 (1993), which permits a lawyer to share all or part of a legal fee with a non-profit corporation that sponsored the underlying litigation so long as the fee is used by the nonprofit only for future legal services. *See also Rule 5.4(a)(4)* (“[A] lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.”). In the 1993 opinion, the fee was court-awarded, which alleviated the risk of an excessive fee. Also, the corporation's non-profit status reduced the risk of business-motivated interference relating to the expectancy of a fee award.

EXAMPLE:

A local mayor referred municipal legal work to Topper, an attorney. In return, Topper agreed to share legal fees arising out of that work with the mayor. This arrangement constitutes a splitting of fees with a nonlawyer in violation of the disciplinary rules. *Rule 5.4(a)*; *see Illinois State Bar v. Jadrich, 320 Ill. 344 (1926)*.

Rule 5.4(a) states that a law firm or lawyer shall not share fees with a nonlawyer *except*:

1. By agreement between a now-deceased partner and the law firm. The firm may pay compensation over a “reasonable period” of time after the deceased partner's or associate's death to the deceased attorney's spouse, estate, or other specified person. *Rule 5.4(a)(1)*.

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2. When a lawyer who purchases the practice of a lawyer who is deceased, disabled, or has disappeared, pursuant to Rule 1.17, the lawyer may pay the agreed purchase price to the estate or other representative of that lawyer. *Rule 5.4(a)(2)*.
3. A nonlawyer employee (e.g., an office administrator, secretary, or paralegal) may participate in a law firm retirement or employee compensation plan, even though the plan is based in whole or in part on a profit-sharing arrangement funded by legal fees earned by the law firm. *Rule 5.4(a)(3); A.B.A. Informal Op. 1440 (1979); A.B.A. Formal Op. 325 (1970)*.
4. A lawyer may share court-awarded legal fees with a nonprofit organization (e.g., N.A.A.C.P. or A.C.L.U.) that employed, retained, or recommended employment in the matter. *Rule 5.4(a)(4)*.

A lawyer may participate in, and pay a participation fee to, an approved not-for-profit or “qualified” lawyer referral service, provided there is no sharing of fees with the sponsoring referral organization. *Rule 7.2(b)*. Unless the lawyer referral program is not-for-profit or a qualified plan approved by the appropriate body, a lawyer may not pay an entity to refer cases to the lawyer. *Ronald D. Rotunda, & John S. Dzienkowski, Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility § 7.2-3(d) at 1248-1249 (2015-2016 ed.)*.

H. “OF COUNSEL”

The A.B.A. describes the following four different proper uses for the “of counsel” title:

1. A lawyer who practices part-time in association with a firm or another lawyer;
2. A retired partner who, although not actively practicing law, nonetheless remains associated and available for occasional consultation;
3. A probationary partner-to-be, typically brought in with the expectation that he or she will become a partner after a short period of time; and
4. A person with status between partner and associate but who, unlike 3. above, has no expectation of promotion to full partner status.

The use of the title “of counsel” on letterhead, law lists, professional cards or office signs in identifying the relationship between a law firm or lawyer and another law firm or lawyer is permissible as long as the relationship is “close, regular and personal,” and “the use of the title is not otherwise false or misleading.” *A.B.A. Formal Op. 357 (1990)*. Therefore, it is not ethically permissible to use the term “of counsel” on signs, letterhead, professional cards, or law lists to designate relationships:

1. Involving only an individual case;
2. Of referrer or receiver of legal business;
3. Involving only occasional collaborative efforts among otherwise unrelated lawyers or law firms; or

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4. Of an outside consultant. *Id.*

“A different use of the same term ‘of counsel’ occurs when a lawyer (or firm) is designated as of counsel solely for the purpose of a particular case: in such circumstances, there is no general holding out as to a continuing relationship, or as to a relationship that applies to anything but the individual case.” *Id.* Under these circumstances, the “of counsel” term can be used in the litigation papers in that one case, but not in firm announcements or stationery because the relationship is limited to just the single matter.

I. SALE OF A LAW PRACTICE

What happens to the law practice when a sole practitioner disappears, dies, retires, goes into public service, becomes a judge, becomes disabled, moves out of state, or ceases to practice in an area of the law? If the lawyer was in a firm, then the partnership agreement should provide for a buy out of the lawyer’s interest, but what does a sole practitioner do with a practice that the lawyer has spent perhaps decades building?

Rule 1.17 permits the sale of a law practice (including its “goodwill”) provided the selling attorney:

1. Ceases to engage in the private practice of law in either the geographic area or the entire state (the A.B.A. leaves it to the jurisdiction to select which one) in which the practice has been conducted. However, a subsequent return to practice is permissible if there is an unanticipated change in circumstances, e.g., a judge is not reelected and then resumes the practice of law. *Rule 1.17 cmt. 2.*;

The “cease to engage” language requires the selling lawyer to stop accepting new matters in the practice or area of practice that was sold. The selling lawyer, however, is permitted and is encouraged to assist the buyer in the transition of client matters for a reasonable time period. *ABA Formal Op. 408 (2014).*

2. Sells the entire practice or an entire area of the practice to one or more lawyers. If only an area of the lawyer’s practice is sold (e.g., domestic relations cases or personal injury matters) and the seller remains in the active practice of law, the seller must cease accepting any matter in the area of practice that has been sold, either as counsel, as co-counsel, or by assuming joint responsibility for a matter in connection with the division of a fee. This requirement that the selling lawyer cease the private practice of law entirely or in a particular area does not prohibit the lawyer from continuing to practice for public agencies or for organizations that offer legal services to the poor. *Rule 1.17 cmt. 3.*;
3. Gives written notice to the seller’s clients regarding:
 - a. the proposed sale;
 - b. the client’s right to retain other counsel or to take possession of the file;
 - c. the fact that the client’s consent to the transfer of the client’s files will be presumed if the client does not object within 90 days of receipt of the written notice; and

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4. Obtains an agreement from the lawyer that the fees charged to clients by the purchaser of a law practice shall not be increased by reason of the sale, i.e., the purchase price may not be financed by increases in fees charged to the clients of the practice. Thus, the client's fee arrangement with the attorney selling the practice must be honored by the buyer as a matter of contract law. *See Rule 1.17 annot. (2015) (under the heading "Purchaser May Not Increase Fees")*. Also, neither the seller nor buyer can bill clients for the time spent on the transition of the sale. *ABA Formal Op. 468 (2014)*.

These rules governing the sale of a law practice were adopted because it was determined that the sale of a law practice is no more an infringement on a client's confidences than that which occurs when a lawyer hires a new associate or merges with another law firm.

As noted above, consent to the transfer of a client's file will be presumed if the client does not object within 90 days of receiving the written notice required under Rule 1.17(c). *Rule 1.17(c)(3)*. If the client cannot be contacted, a court order is required before the client's file may be turned over to the purchaser.

These rules do not apply to the dissolution of a partnership or professional association since Rule 5.6 would prohibit the partners from restricting one another's right to practice law after dissolving their relationship. *A.B.A. Formal Op. 300 (1961)*.

J. CHANGING FIRMS (See also Chapter IV H. 3., *infra*.)

A lawyer leaving a law firm may solicit firm clients on whose matters the lawyer has actively and substantially worked. This solicitation should not occur until the departing lawyer has (a) actually left the firm, or (b) informed the firm of the lawyer's intent to leave. *Graubard, Mollen, Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112 (1995); *Dowd & Dowd, Ltd. v. Gleason*, 816 N.E.2d 754 (Ill. App. Ct. 2004). This affords the departing lawyer and the law firm equal opportunity to solicit the clients with whom the departing lawyer actively worked. Once the client makes the decision to either remain with the firm or to follow the departing lawyer, the client's file must be handled appropriately, i.e., in the best interest of that client.

"Ideally, such approaches [of current firm's clients] would take place only after notice to the firm of the partner's plan to leave" *Graubard*, 86 N.Y.2d at 120. Withdrawing partners should be mindful that they owe a fiduciary duty to the other partners in the firm. "[P]reresignation surreptitious 'solicitation' of firm clients for a partner's personal gain . . . is actionable . . ." in tort (breach of fiduciary duty). *Id.* at 119. Rule 7.3 forbids direct in-person, live telephone, or real-time electronic solicitation of professional employment from prospective clients with whom the lawyer has "no prior . . . professional relationship." The ABA has taken the position that the departing lawyer can notify existing clients, with whom that lawyer has a direct professional relationship, of the impending departure. *A.B.A. Formal Op. 99-414 (1999)*. However, the "far [] better course" is for the departing lawyer and the law firm to give joint notice to clients. *Id.* at n.4; see *Barry R. Temkin, Whether, When and How to Notify Clients of a Lawyer's Resignation*, 83 N.Y.S.B.A. J. 47 (Mar./Apr. 2011).

Both the migrating lawyer and those lawyers remaining with the law firm may have a sufficient "prior professional relationship" with the clients to permit face-to-face solicitation of business. *Rule 7.3(a)(2)*.

K. RESTRICTING THE RIGHT TO PRACTICE LAW

1. Generally

To ensure a client's free choice of counsel, Rule 5.6 mandates that a lawyer shall not participate in (i.e., offer or accept):

1. A partnership, professional corporation, or law firm employment agreement that restricts the right of the lawyer to practice law after termination of the relationship, except for an agreement concerning benefits upon the lawyer's retirement from the practice of law. Thus, an attorney may not sign a covenant not to compete with the lawyer's current firm in the event the attorney leaves the firm. *Rule 5.6 annot. 2015 (under the heading "Subsection (a): Restrictive Covenants in Employment Agreements")*. Likewise, the attorney cannot be restricted from soliciting firm clients or fellow lawyers in the firm, or from practicing law in the law firm's geographic area. *A.B.A. Informal Op. 1417 (1978)*. This prohibition also includes indirect restrictions on the right to practice law where a law firm conditions the payment of money otherwise owed to a departing lawyer on the lawyer not competing with the firm. *Rule 5.6 annot. 2015 (under the heading "Taking 'Firm' Clients: Financial Disincentives")*. Such provisions likewise restrict a lawyer's right to practice law. *Jacobs v. Norris, McLaughlin & Marcus, 607 A.2d 142 (N.J. 1992)*.
2. A settlement agreement containing a restriction on the lawyer's right to practice as part of a client's settlement.

An attorney cannot offer or agree to a settlement prohibiting the lawyer's future use or disclosure of information obtained during the current representation. Although this may not appear to be a direct ban on future representation, "[a]s a practical matter, . . . this proposed limitation effectively would bar the lawyer from future representations because the lawyer's inability to use certain information may materially limit his or her representation of the future client, and further, may adversely affect that representation." *A.B.A. Formal Op. 00-417 (2000); N.Y. State 730 (2000)*.

EXAMPLE:

An attorney represented a plaintiff in a wrongful death case arising out of a prison riot. The defendants offered a monetary settlement on condition that the plaintiff's attorney agree not to handle, on behalf of any other prisoner, any more cases arising out of the same riot. Such an arrangement imposes an improper restriction on an attorney's right to practice law. To offer or agree to such a condition constitutes an ethical violation. *New Mexico Bar Advisory Opinion 5 (1985)*.

The lawyers who agree to such a confidentiality provision violate Rule 5.6(b) which states "A lawyer shall not participate in *offering or making*" such an agreement. A lawyer who requests the other lawyer agree to such an arrangement also violates Rule 8.4(a) which provides that a lawyer shall not violate the ethics rules or assist or induce other to do so. *S.C. Bar Op. 16-02 (2016)*.

EXAMPLE:

A manufacturer or a government agency proposing a favorable settlement conditioned on the plaintiff's lawyer agreeing not to subsequently represent any similarly situated

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parties in future actions against the manufacturer or government agency impermissibly restricts the lawyer's right to represent other clients. *Rule 5.6; A.B.A. Formal Op. 95-394 (1995); A.B.A. Formal Op. 93-371 (1993); cf. Feldman v. Minars, 230 A.D.2d 356 (1st Dep't 1997) (an agreement restricting a lawyer's right to practice may be enforceable even if it violates this disciplinary rule)*. Such circumstances frequently arise in mass tort cases in which the defendant conditions the settlement on plaintiff's counsel consenting not to commence subsequent suits against the defendant.

EXAMPLE:

In settling a case, a lawyer agreed in writing, not to "reveal" information gained from representing her client in the lawsuit. The A.B.A. found that this was permissible. Indeed, Rule 1.9(c)(2) forbids "revealing" information from a former client's representation. Rule 1.9(c)(1) prohibits "use" of confidential information from representing a former client, but only if the use will be to the disadvantage of the former client. Thus, a lawyer could not agree in a settlement agreement to neither disclose nor use any information obtained during prior representation of a former client because such a broad restriction "effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b)." *A.B.A. Formal Op. 00-417 (2000)*. Accordingly, an attorney should not agree to the terms of a settlement agreement that restricts or substantially impairs counsel's future employment. *Rule 5.6 annot. (2015) (under the heading "Subsection (b): Restrictions That Are Part of Settlements")*.

Note that a restriction requiring a lawyer to devote all legal time to a law firm's or government agency's matters (i.e., prohibiting moonlighting or legal work on non-firm or non-agency matters) does not run afoul of this post-employment rule; this pre-termination restriction is ethically permissible. *Restatement (Third) of the Law Governing Lawyers § 13 cmt. b.*

The one exception to the unrestricted legal competition rule arises when a lawyer who is a participant in a retirement benefit plan retires from the firm. *Rule 5.6(a)*. Payment of retirement benefits to such a lawyer may be conditioned upon the retired attorney actually retiring and not practicing law. The retiring lawyer is not restricted from practicing law, for that lawyer is free to do so at any time. However, if the retired lawyer returns to practice, he or she may forfeit retirement benefits under the contract. Such a scenario must be distinguished, however, from that in which a law firm partnership agreement conditions payment of earned but uncollected partnership revenues upon the withdrawing partner's refraining from the practice of law in competition with the law firm. This latter agreement amounts to an ethical violation and is unenforceable. *Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989)*. Note that a firm may condition receipt of retirement benefits upon a promise that the retiree will not compete with the firm – it is simply that the lawyer's ability to collect already-earned revenues and fees cannot be conditioned on his refraining from practice in competition with the firm. *See Rule 5.6 annot. (2015) (under the heading "Retirement Benefits")*.

EXAMPLE:

A law firm's partnership agreement provided that the firm would be required to buy out a departing partner's interest unless the withdrawing partner committed an act "detrimental" to the partnership, the occurrence of which would excuse the law firm from making further payments. When the partner withdrew from the firm, she

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properly took 300 clients, two secretaries, and an associate to assist in the creation of her newly-formed firm. Her former firm refused to pay her partnership interest due to her “detrimental” act.

HELD:

The “detrimental” clause was nothing more than a disguised covenant not to compete and, thus, was unenforceable. Similar to the clause in *Cohen v. Lord, Day & Lord*, discussed just above, the clause imposed a significant monetary penalty on a withdrawing partner who chose to continue practicing in competition with her former firm. Such a penalty is an impermissible restriction designed to discourage or prevent the withdrawing lawyer from servicing clients who wish to continue being represented by the withdrawing lawyer. *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 601 (Iowa 1990).

EXAMPLE:

A law firm’s rule that a departing partner forfeits half of that partner’s equity interest in the firm if the partner takes firm clients from the firm violated Rule 5.6(a). *Moskowitz v. Jacobson Holman, PLLC* 2016 U.S. Dist. LEXIS 10686 (E.D. Va. Jan. 28, 2016).

2. Corporate Employee Confidentiality and Noncompete Agreements

Rule 5.6(a) prohibits a lawyer from participating in offering or making “a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship” (except in the case of retirement benefits), under the rationale that it limits lawyers’ professional autonomy and also limits the freedom of clients to choose a lawyer. *Rule 5.6 cmt. 1*. Thus, promises not to practice within a particular geographic or substantive area, restrictions on the use of client information or client contact, and promises not to represent the firm’s clients violate the rule. *Rule 5.6 annot. (2015) (under the heading “Subsection (a): Restrictive Covenants in Employment Agreements”)*.

EXAMPLE:

Lawyer-shareholders in a firm organized as a law professional corporation (“P.C.”) entered a shareholder agreement that provided that lawyers who left the P.C. would receive termination compensation unless they departed with clients or employees of the law firm. When two lawyers exited the firm with clients, associates, and paralegals, the law firm invoked the agreement to deny the departing lawyers’ requests for termination compensation.

HELD:

The agreement violates Rule 5.6 because “any provision penalizing an attorney for undertaking certain representation ‘restricts the right of a lawyer to practice law.’” *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142 (N.J. 1992).

Rule 7.2 (see *Section J of this chapter, Changing Firms, supra*) does not prohibit a lawyer withdrawing from a firm to contact and inform that firm’s clients of the lawyer’s new practice since the public has a right to know about available legal services. In that regard, a general

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announcement listing the new firm's name, address, and telephone number is proper. *Rule 7.2 cmt. 2.* While Rule 7.3 forbids direct in-person solicitation for professional employment of prospective clients with whom the lawyer has no "family, close personal, or prior professional relationship," face-to-face and telephone solicitation of firm clients with whom the lawyer worked is proper. In sending a general announcement letter, a lawyer should be careful not to engage in coercion, duress, or harassment, pursuant to Rule 7.3(b)(2), and the lawyer should not make comparisons of legal services that cannot be factually verified. *See Rule 7.1; A.B.A. Informal Op. 1457 (1980).*

EXAMPLE:

Two spouses and their respective attorneys signed a four-way agreement requiring the lawyers to withdraw from further representation of the clients if a matrimonial settlement was not reached and one spouse instead opted to litigate. This collaborative law practice is simply a form of limited-scope representation, i.e., the representation is limited to collaborative negotiations toward a final settlement. As such, it is not per se inconsistent with the Rules. *A.B.A. Formal Op. 07-447 (2007); New Jersey Ethics Op. 699 (2005).*

The A.B.A. has held that a noncompete clause in an employment contract between a large corporation and its in-house counsel violates Rule 5.6(a) because such a clause impermissibly bars an attorney from representing future clients whose interests are adverse to those of the corporation. The A.B.A. concluded, on the other side of the equation, that Rule 1.9 adequately protects the corporation. Rule 1.9 provides that "[a] lawyer who has formerly represented a client [(the corporation)] in a matter shall not thereafter represent another person in the same or a substantially related matter. . . ." Indeed, Rule 1.9(c) specifically prohibits the lawyer from using or revealing information relating to the prior representation to the disadvantage of the former client, unless the Rules would otherwise permit it or (in the case of "using" the information) where the information has become generally known. Distinguished from noncompete clauses are corporate employer requirements that corporate lawyers sign a nondisclosure agreement restricting current or departing lawyers from disclosing confidential information after they leave. The New York Bar Association Ethics Committee has upheld such clauses as long as they contain a provision that they shall be interpreted not to violate Rule 5.6 (governing restrictions on the right to freely practice law) and Rules 1.6(a) and 1.9(c) (governing client confidentiality and duties to former clients). *N.Y.S.B.A. Ethics Op. 858 (2011); A.B.A. Formal Op. 93-371 (1993).*

L. TERMINOLOGY

Rule 1.0 defines several terms with which the MPRE candidate should be particularly familiar. For example, pursuant to Rule 1.0(b), "[c]onfirmed in writing" denotes "informed consent [of a person] that is given in writing by the person[,] or a writing that the lawyer promptly transmits to the person confirming an oral informed consent." It includes both paper as well as electronic records confirming the client's informed consent. Thus, the Rules' requirement that a client's understanding be "confirmed in writing" can be satisfied by a lawyer sending an e-mail or letter to the client.

Generally, confirmations need not be signed by the client (e.g., confirmations of consent to potential conflicts of interest, sharing legal fees with referring attorneys, etc.). There are only three Rules that require a client to actually sign a consent:

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1. Aggregate settlements, under Rule 1.8(g);
2. Business transactions with a client, under Rule 1.8(a); and
3. Contingent fees, under Rule 1.5(c).

Further, under Rule 1.0(e), “[i]nformed consent” requires the lawyer to adequately advise the client of the risks involved in a particular course of action or contemplated inaction, as well as the “reasonably available alternatives to the proposed course of conduct.” A client’s informed consent must be confirmed in writing when in connection with a client’s waiver of the attorney’s conflict of interest.

Under Rule 1.0(d), “[f]raud” denotes conduct that would be characterized as fraudulent “under the substantive or procedural law of the applicable jurisdiction” and, naturally, “has a purpose to deceive.” Note that the Rules do not require that anyone suffer damages or rely on the misrepresentation or omission for the conduct to be considered “fraudulent.” *Rule 1.0 cmt. 5.*

CHAPTER II

THE CLIENT-LAWYER RELATIONSHIP

A. ACCEPTANCE OF EMPLOYMENT

1. Generally

Except when appointed by a court, a lawyer has no ethical obligation to represent every potential client who walks through the law office door. Thus, a lawyer is free to decline to represent a client whose character or cause the lawyer deems to be “repugnant.” *Rule 6.2 cmt. 1.*

QUERY:

A successful and well-respected doctor is accused of performing an illegal abortion. The doctor asks Attorney Alpha, a criminal defense lawyer, to represent him. Does Alpha, who is strongly opposed to abortion, have an ethical obligation to represent the doctor?

ANSWER:

No. Rule 6.2(c) states that a lawyer ordinarily is not obligated to accept a client whose character or cause the lawyer regards as “repugnant.” Indeed, a lawyer should decline employment if the intensity of his personal feelings may impair his effective representation of a prospective client.

QUERY:

Attorney Alpha is a general practitioner. About 85% of his work involves real estate closings and trusts and estates. Alpha avoids trial work because he has “stage fright.” Jones, for whom Alpha once conducted a residential closing, was severely injured by a doctor’s malpractice and asked Alpha to represent him. Must Alpha represent Jones in the medical malpractice action?

QUERY:

No. In fact, Alpha has an ethical obligation to decline employment if Jones’s case involves a sophisticated understanding of medical and trial matters because Alpha would be unable to render competent legal services. *Rule 6.2(a)*. However, Alpha may take the case if, in good faith, he expects to become qualified in personal injury law through study, as long as this preparation would not result in unreasonable delay or additional expense to Jones. Alternatively, Alpha may choose to associate himself with another lawyer who is competent in this area, but he will need Jones’s informed consent and permission.

2. Formation of Attorney-Client Relationship

The lawyer's fiduciary relationship with the client is a contractual agency relationship whereby the lawyer undertakes to render professional legal services and to act in the client's best interests. The lawyer can accept legal employment expressly, impliedly, or by estoppel.

An attorney-client relationship arises when "a person manifests to a lawyer the person's interest that the lawyer provide legal services for the person" and the lawyer either manifests "consent to do so" or fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services. *Restatement (Third) of the Law Governing Lawyers* § 14.

"A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' [protected by the Rule 1.18 confidentiality rules]." *Rule 1.18 cmt. 2*.

By representing an entity or an association (e.g., a corporation, trade association, trust, or estate), the lawyer does not also represent the individual members of the entity or the association. Thus, when the organization's lawyer has discussions with the organization's agents or employees, those discussions do not subsequently disqualify the lawyer if the organization sues the employee or the agent. *Rule 1.13; Restatement (Third) of the Law Governing Lawyers* § 96, *Reporter's Notes*. If, however, the employee and the organization are initially co-clients (this is a question of fact), then the subsequent conflict of interest between the co-clients disqualifies the lawyer from further representation of either co-client once a conflict arises.

3. A Client Already Represented by Another Attorney

If a potential client already has retained counsel, another lawyer may not represent the client unless and until the prior law firm withdraws from the case or is discharged by the client. Upon termination, the prior law firm holds both a retaining and charging lien for work done up to the date of discharge. If, after a hearing, it is determined that the discharge was for cause, the outgoing attorney has no right to a fee or a lien. *Marschke v. Cross*, 82 A.D.2d 944 (3d Dep't 1981).

A client clearly has the right to seek a second opinion from another lawyer who is not otherwise representing another party in the matter. *Rule 4.2 cmt. 4*. The client need not seek the first lawyer's permission before having another lawyer evaluate the representation provided to date.

4. Declining Employment

An attorney is free to decline employment without providing a reason. *Procanik by Procanik v. Cillo*, 543 A.2d 985, 994 & n.6 (N.J. Super. Ct. App. Div. 1988). However, if the attorney does provide a reason, a fiduciary duty of competence to state the law accurately is owed to the party whose representation was declined, since the prospective client will rely on that opinion. *Id.* "If the law is settled, [a lawyer] is expected to know what it is and to state it accurately. If the law is unsettled, debatable or doubtful, [the lawyer] is not required to be correct, . . . but only to exercise an informed judgment based on a reason[able] professional evaluation" (internal citations omitted). *Id. at 994*. The lawyer is not required to correctly anticipate the view the courts "may ultimately embrace." *Id.*

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EXAMPLE:

Attorney Alpha incorrectly advised the client that she had “no case” under existing established law. Attorney Alpha is liable to the potential client for negligent misrepresentation and/or breach of fiduciary duty. *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

A lawyer shall not accept representation in a matter unless he or she can perform to completion competently, promptly, and without a conflict of interest. In addition, under Rule 1.16, a lawyer shall decline employment or withdraw if any of the following circumstances are present:

1. The employment will create a conflict of interest that interferes with the lawyer’s judgment or duty of undivided loyalty to a client. *Rule 1.7.*
2. The lawyer knows, or it is obvious and he or she should know, that the lawyer is likely to be called as a necessary witness. *Rule 3.7 & cmts. 6 and 7.*
3. The lawyer’s physical or mental condition will materially impair the lawyer’s judgment, or will make it unreasonably difficult for the lawyer to provide effective representation. *Rule 1.16(a)(2).*
4. The prospective client’s claim or defense is not warranted under existing law, e.g., it is frivolous, there is no basis for it, or it is not supported by a good faith argument for an extension, modification, or reversal of existing law. *Rule 3.1.* An exception to this rule exists for defense counsel in criminal cases who nevertheless ought to conduct the defense so as to require the prosecutor to prove every element of the crime beyond a reasonable doubt. *Id.* Also note that a claim is not necessarily “frivolous” just because the lawyer does not believe that the client will prevail. *Rule 3.1 cmt. 2.*
5. The representation would require the attorney to knowingly engage in conduct that is illegal or violates a disciplinary rule. *Rule 1.16(a)(1).*
6. The lawyer is discharged (fired) by the client. *Rule 1.16 (a)(3).*

As a general rule, a lawyer withdrawing from pending litigation must do so with court approval on notice to all parties. *Rule 1.16 cmt. 3; see Withdrawal From Legal Employment, infra, this Chapter at D.*

5. Declining a Court Appointment

A court may appoint an attorney to represent a client. A lawyer shall not seek to decline such an appointment except where:

1. representation of the client would violate the Rules (e.g., where the lawyer has a conflict of interest or the lawyer is incompetent to handle the matter (pursuant to Rule 6.2(a));
2. representation of the client would impose an unreasonable financial burden on the lawyer, so great as to be “unjust” (pursuant to Rule 6.2(b)); or

3. the cause is so repugnant to the lawyer that it would impair the lawyer-client relationship or the lawyer's ability to zealously represent the client (pursuant to Rule 6.2(c)).

B. SCOPE, OBJECTIVE, AND MEANS OF THE REPRESENTATION

The express or implied contract between the client and the lawyer generally defines the scope of representation as well as its limitations (e.g., to write a contract and not to litigate it, or to enter a fee arrangement with specified budget limitations).

If no fee retainer agreement is entered at the outset of the representation, or the lawyer's fee is unilaterally modified upwards by the lawyer after the beginning of legal representation, the client can disregard the terms. *Restatement (Third) of the Law Governing Lawyers* §§ 18 and 38. Rule 1.5 seeks to encourage lawyers to provide a fee arrangement at the outset when a client can easily reject it, negotiate it, or hire a more inexpensive lawyer. Additionally, the Rule seeks to discourage lawyers from altering the fee arrangement at a subsequent date, when the stakes are higher and the client may be discouraged from switching counsel due to the added costs of a midstream substitution. In short, lawyers should refrain from using the old "bait and switch" tactic. *See Rule 1.5 annot., at 88-89 (2015) (under the heading "Modification of Agreements")*.

If the fee arrangement is not reached until after the lawyer's services have been completed, the client is free to disaffirm the agreement if the client was not earlier informed by the lawyer of the facts needed to evaluate the appropriateness of the lawyer's compensation. Even where the client is permitted to rescind the fee agreement, however, the client is not totally relieved from paying a reasonable sum for the fair market value of the lawyer's services, based on quantum meruit, fixed and approved by the court.

A lawyer can expressly limit the scope and objectives of the lawyer's legal representation, provided the limitation is reasonable and the client gives informed consent after being fully informed of any significant problems such limitation may cause (e.g., by limiting the representation to a trial but not to an appeal, by limiting the representation to litigation only and excluding legal advice on the income tax implications of any recovery, by limiting a criminal representation to the arraignment, the grand jury, or the criminal trial, or by limiting the lawyer's services to a brief telephone consultation). *Rule 1.2(c); Restatement (Third) of the Law Governing Lawyers* § 19.

EXAMPLE:

If a corporate client puts a budget limit on the proposed litigation, an attorney can agree to limit otherwise costly pretrial discovery even though it lessens the odds of the corporation's success at trial, as long as the attorney fully informs the client of this danger at the outset of the representation.

EXAMPLE:

A neighborhood legal clinic can offer to review a client's income tax return for only one hour for a reduced fee, provided the client is fully informed of the significant problems such a limited review might entail. Thus, a client, in exchange for a limited fee, can waive the lawyer's duty to conduct a more thorough review of the tax return.

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In light of economic hard times, lawyers are being asked by clients to “unbundle” their legal services and provide “limited assistance representations,” i.e., a la carte representations that require something less than full representation, because of the client’s economic limitations. The keys to providing a limited assistance representation are obtaining the client’s informed consent and ensuring that the limited representation is “reasonable” under the circumstances.

EXAMPLE:

A law firm was retained to litigate a client’s amount of tax liability. The firm successfully contested a claim against the Internal Revenue Service for back taxes. However, the client argued that the firm committed malpractice by failing to investigate an agreement between the client and a third party that may have relieved the client of primary liability on the taxes. The court disagreed, and held that the firm was not liable to the client for legal malpractice for failing to advise the client in that respect, as the matter was beyond the scope of the retainer agreement. *AmBase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 434-35 (2007).

Absent emergency circumstances, when other legal advice is unavailable, this Rule permitting limitations on the scope of the legal representation (Rule 1.2(c)) generally cannot be used to excuse a lawyer’s duty to provide adequate and competent counsel.

Once the attorney-client relationship is entered into, the lawyer must keep the client fully informed by advising and consulting with the client. The lawyer must promptly respond to a client’s “reasonable request” for information, e.g., respond to the client’s request for monthly status and fee reports. *Rule 1.4(a)*. The lawyer has a duty to keep the client fully informed of any settlement offers in civil litigation, as well as any plea bargains from the prosecutor in criminal cases. The client, as principal of the agency relationship, makes the decisions and is entitled to be kept informed by the lawyer.

In the decision-making process, the lawyer shall inform and consult with the client to enable the client to determine the means to pursue the client’s objectives. “A lawyer shall abide by a client’s decision whether to settle a [civil] matter.” *Rule 1.2*. However, a lawyer who was given blanket authority to settle the civil matter does not have to advise the client of every offer. *Rule 1.2 cmts. 1 and 3; see also Rule 1.4(a)*. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to whether a plea is to be entered, whether to waive a jury trial, and whether the client will testify. *Rule 1.2(a)*. It is the client’s choice whether to accept such an offer, but the client may delegate this decision-making process to the attorney.

When a client retains a lawyer, the lawyer is endowed with implied authority to pursue the client’s objectives. For example, at a pretrial conference, a lawyer has apparent authority to agree to waive further discovery and go directly to trial, or to agree with an adversary to limit the number of expert witnesses called at trial even though the client’s usual litigation procedure is not to do so. Clients are bound by such stipulations. Likewise, a real estate lawyer has apparent authority to extend a closing date, and the client, otherwise disagreeing with this exercise of authority, is bound to the extension. A lawyer, however, does not have apparent authority to settle the client’s claim unless the client previously manifested such authority in the lawyer.

The rule that prevails in the great majority of jurisdictions is that the mere fact that a lawyer possesses the authority to represent a client gives the lawyer no implied authority to settle litigation.

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The client's consent [to settle] need not be expressed in any specific form. Whether the lawyer's authority is express, implied, or apparent makes no difference with respect to the binding effect of the settlement vis-a-vis third parties. *Hallock v. State of New York*, 64 N.Y.2d 224 (1984). But a lawyer who, without express client authorization, enters into a settlement contract that detrimentally affects a client's interest because of the apparent authority or implied authority doctrine may be liable to the client for breach of contract. *Charles W. Wolfram, Modern Legal Ethics* § 4.6 at 169-70 (1986).

EXAMPLE:

Where plaintiffs advised counsel that they did not approve of the defendant's settlement proposal, but counsel accepted the offer in open court at a hearing on the morning of the trial, the plaintiffs were bound by counsel's settlement. Under the circumstances, counsel had apparent authority to settle the case and it was reasonable for the defendants to rely upon that apparent authority. The plaintiffs were bound by the settlement, but had a malpractice claim against counsel for their damages. *Hallock v. State*, 64 N.Y.2d 224 (1984).

C. CLIENT WITH DIMINISHED MENTAL CAPACITY

When the client's capacity to make decisions is diminished by a disability (infancy, Alzheimer's, addiction to drugs or alcohol, stroke, or coma) the lawyer must, to the extent reasonably possible, maintain a normal attorney-client relationship. *Rule 1.14(a)*.

The client is the creator of the goals to be reached by the attorney-client relationship, but the lawyer is given discretion as to the means used to achieve the client's goals. *Rule 1.2 cmt. 1*.

If the client with diminished capacity has no guardian and the lawyer reasonably believes the client is at risk of a substantial physical, financial, or other harm if protective action is not taken, the lawyer may then take protective action including consulting with those who have the ability to act to protect the client, including seeking the appointment of a guardian or conservator. *Rule 1.14(b)*. The lawyer may seek appointment of a guardian if such appointment is practical and would advance the client's objectives and best interests. The lawyer, however, should not undertake to represent a spouse, child, or other third party petitioning for guardianship over the lawyer's client. *A.B.A. Formal Op. 96-402* (1996); *Restatement (Third) of the Law Governing Lawyers* § 24 (2000).

If the client with diminished capacity has a guardian, the lawyer must continue to protect the disabled client's interests, but the lawyer must adhere to the guardian's directions unless the guardian's decisions would violate the guardian's fiduciary duty toward the incompetent client. *See Rule 1.14 cmts. 3 and 4*.

Withdrawal from representing an incompetent client is discouraged, and withdrawal is permissible only if it can be done without undue prejudice to the incompetent client. *A.B.A. Formal Op. 96-402*. Note that under ordinary principal-agency rules, the principal's incompetence terminates the agent's authority to act. However, there is no automatic rule for a lawyer's representation of a client to immediately cease upon the client's incompetency. The guideline is for the lawyer, under such circumstances, to act in the best interest of the disabled client. *Restatement (Third) of the Law Governing Lawyers* § 24 (2000).

D. WITHDRAWAL FROM LEGAL EMPLOYMENT

1. Generally

The Rules set forth the conditions under which withdrawal from legal employment is required or permitted. Generally, a lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse impact on the rights of the client and the possibility of prejudice to the client. Even when the lawyer justifiably withdraws, the lawyer should protect the welfare of the client by providing due notice of withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled (subject to the lawyer's retaining lien), cooperating with subsequently employed counsel, and otherwise endeavoring to minimize the possibility of harm. *Rule 1.16(d)*.

A lawyer is subject to discipline if the lawyer withdraws from employment in a proceeding before a tribunal (e.g., in the course of litigation) without the tribunal's permission (when permission is required) or without taking reasonable steps to avoid foreseeable prejudice to the client's rights. *Rule 1.16(c) and (d)*. If the client or the lawyer unilaterally terminates the lawyer-client relationship, but the court nevertheless orders the lawyer to continue the representation, the lawyer shall continue the representation, notwithstanding good cause for withdrawing. *Rule 1.16(c); Restatement (Third) of the Law Governing Lawyers § 31 (2000)*.

After a lawyer has made a motion to withdraw from representing a client (e.g., the client is using the lawyer's legal services to pursue a crime or fraud, or the continued representation of the client involves an irreconcilable conflict of interest), the lawyer, while awaiting the court's order, must continue to represent the client, provided the representation involves no improper behavior by the lawyer. If, on the other hand, the client has discharged the lawyer, the lawyer, while awaiting the court's approval to withdraw, must cease representation unless the lawyer's actions are essential to protect the client's interest, e.g., a time period for taking legal action is about to expire. *Restatement (Third) of the Law Governing Lawyers § 33 (2000)*. Even though the client has discharged the lawyer, thereby ending the lawyer's actual authority to act as the client's agent, the lawyer, absent notice to third persons or to the court, continues to possess apparent authority and, therefore, under agency rules, can continue to bind the client.

2. Client's Discharge of a Lawyer

a. Generally

A client is free at any time to fire a lawyer for good cause, bad cause, or no cause at all. *Restatement (Third) of the Law Governing Lawyers § 32(1) (2000)*. The attorney-client relationship is a fiduciary one, and the client cannot by contract be compelled to continue that relationship against the client's wishes.

A client may, at any time, with or without cause, discharge an attorney in spite of a particularized retainer agreement between the parties. *Rule 1.16(a)(3); Matter of Dunn, 205 N.Y. 398 (1912)*. Moreover, since the client has the absolute right, on public policy grounds, to terminate the attorney-client relationship at any time without cause, it follows that the client cannot be compelled to pay breach of contract damages for exercising the right which is an implied condition of the contract. Note also that New York's Court of Appeals held that, even where the client deliberately made a material misrepresentation to the attorney for the purpose of inducing the

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attorney to enter a retainer contract and then abruptly discharged the lawyer, the attorney did not have a cause of action against the client for damages based on fraud because of the strong public policy allowing a client to terminate a retainer contract at will. *Demov, Morris, Levin & Shein v. Glantz*, 53 N.Y.2d 553 (1981).

b. Discharged Lawyer's Compensation

“If the discharge is with cause, the attorney has no right to compensation or to a retaining lien. . . .” *Teichner v. W & J Holsteins*, 64 N.Y.2d 977 (1985); *Nabi v. Sells*, 70 A.D.3d 252, 253 (1st Dep’t 2009); *Restatement (Third) of the Law Governing Lawyers* §§ 32, 37 & 43 (2000). A lawyer discharged without cause, however, may seek payment for legal services rendered up to the point of discharge. The attorney who is discharged without cause generally is entitled to recover in quantum meruit for the reasonable value of services rendered “whether that be more or less than the amount provided in the contract or retainer agreement” *Lai Lang Cheng v. Modansky Leasing Co.*, 73 N.Y.2d 454 (1989). Accordingly, where the original retainer agreement was for a contingent fee, the lawyer’s recovery still may be based on quantum meruit.

Following discharge and pending payment of a legal fee, the lawyer is entitled to exercise a retaining lien on the client’s papers in the lawyer’s possession. Alternatively, a lawyer who was engaged under a contingency fee may ask the court to fix and impose a charging lien on any money ultimately awarded to the client. The fee will be based on the percentage of the discharged attorney’s efforts in bringing the case to a successful conclusion.

c. Client's Death

The death of a client automatically terminates the lawyer’s actual, but not apparent, authority to act. If, unknown to the court and the attorneys involved, a client dies after authorizing a lawyer to accept a settlement offer but before the acceptance was conveyed to the other side, most jurisdictions hold that the client’s death does not extinguish the lawyer’s apparent authority, and that the third party dealing in good faith with the lawyer can enforce the settlement agreement.

Upon the death of the client, the decedent’s estate steps into the shoes of the client and the lawyer must take steps to substitute the estate as the proper party in any pending action. The estate’s executor may wish to continue using the prior attorney’s services or may wish to hire a new lawyer in the matter. If a client’s will expressly appoints an executor while also naming an attorney to handle the decedent’s legal affairs and estate, the executor remains free to disregard that direction and choose a different attorney. *In re Succession of Wallace*, 574 So.2d 384 (La. 1991).

d. Client's Objective Achieved

Once the client’s contemplated goal is achieved, ordinarily the lawyer’s authority to act further for the client ceases. For example, a lawyer retained by a client to obtain a divorce has no authority after the divorce has been granted to modify the client’s support or custody agreement without new authority from the client.

THE CLIENT-LAWYER RELATIONSHIP

3. Mandatory Withdrawal by Attorney

A lawyer **must** withdraw from employment if:

1. The lawyer's continued employment will result in a violation of a disciplinary rule. For example, the lawyer cannot continue to represent a client if:
 - a. The attorney is not competent to handle the matter (pursuant to Rule 1.1); or
 - b. A conflict of interest exists (pursuant to Rule 1.7(a), subject to the exceptions provided in Rule 1.7(b)).
2. The lawyer's services are being used to further a client's crime or fraud. *Rule 1.2(d) (providing that a lawyer shall not assist a client in conduct the lawyer knows is criminal or fraudulent); Rule 1.16(a) (providing that a lawyer shall withdraw if the representation will result in a violation of ethics rules or other law); cf. Rule 1.16(b) (providing that a lawyer may withdraw if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent or has used the lawyer's services to perpetrate a crime or fraud).*

If withdrawal alone is insufficient to disassociate the lawyer from the client's wrongdoing, it may be necessary for the lawyer to make a "noisy withdrawal" by giving opposing parties notice of the withdrawal and disaffirming the attorney's prior work product (documents, opinions, etc.). *Rules 1.2(d), 1.4, and 1.16(a).*

If the client has used or is using the lawyer's services to commit fraud (e.g., securities fraud, a Ponzi scheme, or to submit fraudulent papers to secure a loan), and the fraud would cause or has caused substantial economic harm to others, then the lawyer *may* reveal client confidential information to mitigate the harm. *Rule 1.6(b)(2).*

3. The lawyer's mental or physical condition makes it unreasonably difficult (materially impairs the lawyer's ability to represent a client) for the lawyer to carry out the employment effectively.
4. The lawyer is discharged by the client or the client gives informed consent to termination of the relationship.
5. The lawyer becomes aware that the lawyer will be called as a necessary witness. *Rule 3.7.* The Rules require disqualification of a testifying lawyer because the function of an advocate is to explain evidence given by others, whereas the function of a witness is to state facts objectively. Allowing an advocate at trial to also take the stand and testify on the client's behalf opens the lawyer to impeachment as a biased witness, thereby weakening the evidentiary value of the lawyer's testimony. Thus, the lawyer who is a "necessary witness" cannot serve as an advocate at trial, but he or she may continue to represent the client in all pretrial and post-litigation roles short of advocacy at the trial. *Williams v. Hicks, 31 Misc. 3d 605 (Sup. Ct. Dutchess Co. 2011); Culebras Enterprises Corp. v. Rivera-Rios, 846 F.2d 94 (1st Cir. 1988); U.S. v. Castellano, 610 F. Supp. 1359 (S.D.N.Y. 1985); A.B.A. Informal Op. 1446 (1980).* In addition, if the content of the lawyer's testimony is the subject of a motion or an

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appeal, then someone else *should* (but is not required) argue the motion or the appeal. *A.B.A. Informal Op. 89-1529 (1989)*.

The “necessary witness” standard requires a showing that the testimony that the lawyer is to give at trial is relevant and cannot be obtained elsewhere, including from other witnesses. If the lawyer’s proposed testimony merely will be cumulative, then it is not “necessary” and does not require the lawyer to withdraw from representation at the trial. Also, keep in mind that if withdrawal would work a substantial hardship on the client, the lawyer may continue to act as an advocate at trial even where the lawyer is likely to be a necessary witness. *Rule 3.7(a)(3)*.

EXAMPLE:

Where an attorney was the only witness to the parties’ oral agreement, the court disqualified the lawyer as a necessary witness. “Here, since the plaintiff’s attorney was the only person other than the parties who had knowledge of any discussions regarding the terms of the oral agreement underlying the litigation, he is ‘likely to be a [necessary] witness on a significant issue of fact.’” *Falk v. Gallo*, 73 A.D.3d 685 (2d Dep’t 2010).

A lawyer must comply with applicable law requiring notice to or permission from a tribunal when terminating representation. *Rule 1.16(c)*. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation. *Id.*

4. Permissive Withdrawal

A lawyer may request permission to withdraw in matters pending before a tribunal if withdrawal will not materially prejudice the client. Where it is not mandatory to withdraw, the lawyer may do so if:

1. Withdrawal can be accomplished without a material adverse effect on the interest of the client. *Rule 1.16(b)(1)*. Here, the timing of the withdrawal is critical. The lawyer is free to withdraw if the client has sufficient time to hire a new lawyer.
2. The client insists on pursuing an objective that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. *Rule 1.16(b)(4)*.
3. Other “good cause” for withdrawal exists (e.g., the lawyer’s inability to work with co-counsel indicates that the best interests of the client will be served by the lawyer’s withdrawal). *Rule 1.16(b)(7)*.
4. The client deliberately disregards the fee agreement or obligations to the lawyer as to expenses or fees, and the lawyer has given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled. *Rule 1.16(b)(5)*. “[A]n attorney will be permitted to withdraw from employment where a client refuses to pay reasonable fees The plaintiff refused to pay the fees in accordance with clear terms of the retainer agreement and had ceased payment on her account more than two years before the appellant sought to withdraw. The [lawyer] should not be forced to continue ‘to finance the litigation or render gratuitous services’” *Galvano v.*

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Galvano, 193 A.D.2d 779 (2d Dep't 1993); *Fid. Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, 310 F.3d 537, 540 (7th Cir. 2002). A lawyer, however, must give reasonable warning that the lawyer will withdraw when the client fails to substantially fulfill the obligation. For example, if a lawyer deliberately fails to appear at a hearing the day after demanding a fee payment for an amount disputed by the client, the lawyer will be subject to discipline for failing to give adequate warning before withdrawing. *Charles W. Wolfram, Modern Legal Ethics*, § 9.5 at 549-50 (1986).

Remember, when withdrawing from a civil matter before a tribunal, the lawyer must always consider the duty of confidentiality to the client which requires cooperation between the judge and the withdrawing lawyer. In a court motion to withdraw for nonpayment of the legal fee, specific client information should not usually be disclosed. "The lawyer's statement that professional considerations require termination . . . ordinarily should be accepted [by the judge] as sufficient." *Rule 1.16 cmt. [3]*. If the Court requires more detailed information to grant the withdrawal motion, the ABA recommends making the motion under seal for only the court's review in chambers. *ABA Formal Op. 476, n. 16* (2016).

5. The client has rendered it unreasonably difficult for the lawyer to represent the client. *Rule 1.16(b)(6)*. Examples of conduct rendering representation "unreasonably difficult" are a client's refusal to talk with counsel, a client's insistence on preparing the case, intense antagonism between the lawyer and client, or the client's persistent lying to the lawyer and misrepresenting the facts.
6. The representation will result in an unreasonable financial burden on the lawyer. *Rule 1.16(b)(6)*. The "financial burden" language was added by the Rules, but it is not for the purpose of bailing out an attorney when a case proves less profitable than anticipated. This financial burden rule is more favorably received by courts when the application is made by a solo practitioner rather than a large law firm. This motion, even for a solo practitioner, is not a foregone conclusion because, ordinarily, one contracting party's unilateral mistake as to the cost or expense to perform a contract is not a satisfactory basis for rescission.
7. The client persists in a course of action that the lawyer *reasonably believes* is criminal or fraudulent, since a lawyer is not required to be associated with such conduct even though the lawyer's services do not further it. *Rule 1.16(b)(2); cf. Rules 1.2(d), 3.3(b), and 4.1*.

Remember, Rule 1.4(a)(5) requires a lawyer to consult with a client about ethical limitations on the lawyer's conduct where the lawyer knows the client expects legal assistance not permitted by the law or the Rules. This consultation duty most frequently arises when the client expects the lawyer to assist in fraudulent or criminal conduct prohibited by Rule 1.2(d).

EXAMPLE:

Alpha is a lawyer who represented a notorious criminal accused of killing a waiter in a restaurant. After committing the crime, the client fled to another state and called Alpha to inform Alpha of the client's whereabouts. Assuming that it is a crime to remain a fugitive under these circumstances, is Alpha subject to disciplinary action if

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she does not withdraw as a result of the client's refusal to surrender?

HELD:

No. Alpha may, but is not required to, withdraw if the client “personally seeks to pursue an illegal course of conduct.” *Ass'n of the Bar of the City of New York, Op.81-13 (1981); A.B.A. Formal Op. 349 (1984)*. A lawyer is not required to withdraw from representation of a fugitive when the fugitive refuses to follow the lawyer's advice to surrender. In fact, a lawyer may continue in the representation of a client even though the client has elected to pursue a course of conduct contrary to the advice of the lawyer, so long as the lawyer does not thereby knowingly assist the client in engaging in illegal conduct. *Rule 1.2(d)*.

EXAMPLE:

Baker represented Parker who was accused of murder. As part of his defense, Parker insisted that Baker call Leftie and Butch to present alibi testimony on his behalf. Baker knew from his discussions with his client that Leftie and Butch would perjure themselves. Baker refused to call them to testify. Must Baker withdraw from the case?

HELD:

No. Baker may, but need not, withdraw. Baker was correct in not calling Leftie and Butch because a lawyer may not offer testimony to the court that the lawyer knows to be false, fraudulent, or perjured. *Rule 3.3(a)(3)*. If Baker and the client irreconcilably disagree on the handling of the case, Baker may, upon proper application, withdraw from the case, but such withdrawal is not mandatory. *People v. Schultheis, 638 P.2d 8 (Colo. 1981)*.

5. Lawyer's Duties upon Withdrawal

When a lawyer is fired or withdraws, the lawyer must take reasonable steps to protect the client's interests. These steps include the following:

1. Consulting with the client and giving the client, tribunal, and third parties involved reasonable notice of the termination.
2. Recommending other possible attorneys and cooperating with substitute counsel.
3. Allowing the client reasonable time to employ substitute counsel.
4. Surrendering the papers and property held by the attorney to which the client is entitled (subject to a possible retaining lien to secure any unpaid fee), and
5. Refunding any part of the fee paid in advance that has not been earned. *Rule 1.16(d)*.

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E. FEES FOR LEGAL SERVICES

1. Determination of a Reasonable Fee

There are several different types of fee arrangements:

1. a fixed flat fee (e.g., \$800 for a house closing, \$2,000 to handle a misdemeanor case, or \$200 for a simple will);
2. an hourly rate based on time actually expended on the legal matter;
3. a percentage fee (e.g., 1% of the value on a real estate closing or 2% of the net value of the decedent's estate on the probate); and
4. a contingent fee based on a percentage of money actually recovered (e.g., 30% of a personal injury recovery or 15% of any money recovered against a debtor who signed a note or mortgage).

Lawyers are not completely free to negotiate fee arrangements with clients. Imposed on every fee arrangement entered into between a lawyer and client are the following:

1. A lawyer may not charge or collect a fee "larger than is reasonable [under] the circumstances or that is prohibited by law." *Restatement (Third) of the Law Governing Lawyers* § 34 (2000); *Rule 1.5(a)*.
2. A lawyer cannot require the client to agree to a non-refundable fee or retainer.
3. Upon termination of the lawyer's services, the lawyer must return any unearned part of the fee or retainer.
4. If a lawyer engages in certain ethical misconduct, the lawyer forfeits the right to seek any fee and must return to the client the entire fee paid, if any. *Restatement (Third) of the Law Governing Lawyers* §§ 33, 37, & 42 (2000); *Quinn v. Walsh*, 18 A.D.3d 638 (2d Dep't 2005).
5. Costs and disbursements must be reasonable under the circumstances. *Rule 1.5(a)*. The lawyer is free to waive a client's duty to pay legal expenses or even waive the legal fee owed to the lawyer. *Restatement (Third) of the Law Governing Lawyers* § 19 (2000).

Unless the lawyer has regularly represented the client on the same basis or rates, the lawyer shall communicate the basis or rate of the fee to the client, preferably in writing, "before or within a reasonable time [promptly] after commencing the representation . . ." *Rule 1.5(b)*. The agreement must also clearly notify the client of any reasonable expenses for which the client will be responsible. *Id.* For example, a lawyer may seek reimbursement for in-house expenses (e.g., Xerox, messenger service, or telephone expenses). In New York, where the fee is \$3,000 or more, the attorney must provide the client with an engagement letter containing a description of the scope of the legal representation, the hourly charge, the billing cycle, the approximate time expected to

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complete the matter, and that the client can demand arbitration of any fee dispute. 22 NYCRR § 1215; *Seth Rubenstein, P.C. v. Ganea*, 41 A.D.3d 54 (2d Dep’t 2007).

Rule 1.5(b) recommends that the fee and expense understanding generally be in writing, and Rule 1.5(c) mandates that contingent fees be reduced to writing. An exception to the fee-in-writing requirement occurs when there is an emergency situation or when the attorney and client have an ongoing relationship where the basis of the fee may be implied.

If the lawyer is unable or unwilling to enter a fee arrangement prior to or promptly after commencing representation, the lawyer is entitled to only a quantum meruit recovery for the fair value of the legal services performed. *Restatement (Third) of the Law Governing Lawyers* § 39 (2000). Where the parties did not enter a fee agreement at the outset of the lawyer’s representation, the court is entitled to fix a “reasonable” fee, which often falls to the lower range of reasonableness. *Restatement (Third) of the Law Governing Lawyers* § 34 cmt. a (2000).

EXAMPLE:

Attorney Alpha agreed to and received an \$18,000 flat fee to represent Client who was charged with a serious felony. In a matter of two weeks, Alpha negotiated a plea bargain calling for probation and no jail time for Client. Because of the result (a speedy and favorable disposition), the fee arrangement is reasonable. On the other hand, if the day after the client paid the fee, through no efforts of Alpha, the D.A. dropped the charges because of inadmissible or insufficient evidence, the \$18,000 legal fee would likely be deemed unreasonable.

When a fee is fixed by a law firm (e.g., a \$250 per hour or a flat fee), that fee includes law firm overhead such as rent and electricity. The law firm may charge additional reasonable fees, however, for computer-assisted legal research, as well as for photocopying, messenger service, on-site meals (e.g., orders placed through www.seamless.com), etc. The additional fees may include, for example, the cost of copies plus a reasonable allocation of the in-house copy machine operator’s salary. *A.B.A. Formal Op. 93-379* (1993); see *Rule 1.5 cmt. 1*. In addition to the agreed legal fee, the lawyer can assess a client for the out-of-office expenses charged by a third person, such as a stenographer’s cost, court costs, expert’s expenses, etc.

The majority view in the United States is that legal fees paid in advance remain the property of the client until earned by the attorney. Legal fees paid in advance shall be deposited into the law firm’s escrow account, with such fees to be withdrawn only as earned or as expenses are incurred. *Rule 1.15(c)*.

The lawyer may ask for a retainer in advance, but must return any unearned portion. Non-refundable retainer agreements for specific future services are unethical because:

1. A client may at any time, with or without cause, discharge an attorney in spite of a particularized retainer agreement between the parties.
2. A lawyer has an ethical duty to charge a “reasonable fee” that would not deter a lay person from utilizing the legal system.

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3. A lawyer who withdraws from employment shall promptly refund any unearned part of the fee. *Rule 1.16(d)*; see *Matter of Cooperman*, 83 N.Y.2d 465 (1994).

In *Baranowski v. State Bar*, 24 Cal.3d 153 (1979), the court distinguished advance fee payments from a general engagement “retainer fee,” holding that a general retainer fee is earned when the client pays it to secure the availability of the lawyer without regard to the performance of any services, whereas an advance fee is earned only as services are performed. However, under a general engagement retainer fee arrangement, an attorney is retained for a fixed period of time, and promises to be available to perform legal services in relation to matters that may arise during the period of the contract. *Atkins & O’Brien LLP v. ISS International Service System, Inc.*, 252 A.D.2d 446 (1st Dep’t 1998). “The distinction between general and specific retainers is crucial with respect to non-refundability of an attorney’s fees A retainer is general where the services being purchased are the attorney’s ‘availability’ to render services if and as needed in a specific time frame [similar to hiring a limo to wait outside on one street until needed] [A] retainer is special or specific where the funds are paid for a specific service.” *Ryan v. Butera, Beausang, Cohen & Brennan*, 193 F.3d 210 (3d Cir. 1999).

Discipline is warranted if a fee is clearly excessive, e.g., when it is disproportionate to the services rendered, when the attorney fails to render any adequate service, or when the fee exceeds those allowed by the rules of an administrative agency or statute. For example, an attorney was censured for keeping a \$5,000 fee for a simple battery case that did not go to trial and took the attorney no more than 10 hours to handle. See *In re Kutner*, 399 N.E.2d 963 (Ill. 1979); *Newman v. Silver*, 553 F. Supp. 485 (S.D.N.Y. 1982), *mod. on other grounds*, 713 F.2d 14; *In re Simmonds*, 415 N.W. 2d 673 (Minn. 1987); *Matter of Hanna*, 362 S.E.2d 632 (S.C. 1987).

2. Guides to Determine Fee’s Reasonableness

a. Criteria

A lawyer has an ethical obligation to charge a “reasonable fee” which would not deter a nonlawyer from utilizing the legal system to seek protection. *Rule 1.5(a)*. An attorney is entitled to no more than a reasonable fee, regardless of the fee specified in the retainer agreement. *Kiser v. Miller*, 364 F. Supp. 1311 (D.D.C. 1973), *aff’d in part and rev’d in part sub nom, Kiser v. Huge*, 517 F.2d 1237 (D.C. Cir. 1974). *Rule 1.5(a)* lists the following non-exclusive factors to be considered to determine whether a fee is reasonable:

1. The novelty and difficulty of the question involved and the legal skill required to perform the legal service properly;
2. The likelihood that acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstance;
6. The attorney’s relationship with the client (nature and length);

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7. The experience, reputation, skill, and ability of the lawyer or lawyers performing the services; and
8. Whether the fee is fixed or contingent.

In determining the reasonableness of the fee, courts also consider whether the lawyer fully explained the fee arrangement and its probable cost, whether he or she encouraged the client to shop around to ascertain what a reasonable fee is, and what alternatives were available. Other circumstances outside of the rules also may be considered (e.g., the client's ability to pay, the client's sophistication, and the disclosures made to the client). *Restatement (Third) of the Law Governing Lawyers* § 34 cmt. c (2000). "Fees agreed to by clients sophisticated in entering into such arrangements (such as fee arrangements by inside legal counsel [on] behalf of a corporation) should almost invariably be found reasonable." *Id.*

Again, looking at the relevant factors listed in Rule 1.5(a), the MPRE candidate should compare a lawyer's hourly rate with hourly rates charged by comparable lawyers in the community, the number of hours expended on the matter, and finally whether changed circumstances (e.g., the D.A. dropping the case) subsequently rendered the fee arrangement unreasonable.

In addition, the lawyer and the client can agree that a fee is to be paid in property transferred from the client to the lawyer. Such an arrangement, however, is treated by the Rules as an attorney's "business transaction" with the client, and requires additional safeguards. *See Chapter IV E., infra.*

b. Retainer Modification

New York's Court of Appeals warned the bar on attempting to amend a retainer agreement. "[I]t is essential that the terms of representation . . . be set down with clarity. And the onus is upon the lawyers who draft such agreements to do so." *Shaw v. Manufacturers Hanover Trust Co.*, 68 N.Y.2d 172, 179 (1986). Accordingly, courts carefully scrutinize midstream modifications of retainer agreements. *Naiman v. New York University Hospitals Center*, 351 F. Supp. 2d 257 (S.D.N.Y. 2005).

In 2002, one sentence was added to Rule 1.5 stating that a midstream alteration of expenses or modification of the lawyer's fee during the course of the legal representation must be communicated by the lawyer to the client. No comment was added to this amendment to more fully explain the sentence. However, the American Bar Association's Standing Committee on Ethics and Professional Responsibility has issued some guidance in this area. The Committee has stated that if a fee is modified, the client may generally avoid it, unless the attorney can show that the modification was reasonable under the circumstances at the time, and that the modification was communicated to and accepted by the client. *A.B.A. Formal Op. 11-458 (2011)* (citing *Restatement (Third) of the Law Governing Lawyers* § 18(a)(1), among other sources). In explaining the proposed fee increase, the lawyer must advise the client of his right to refuse to agree to the fee change, and the lawyer cannot threaten to withdraw if the client refuses to agree.

The Committee elaborated that while periodic, incremental, reasonable increases in hourly fees are generally permissible, if communicated to and accepted by the client, a lawyer's proposed modifications which change the basic nature of a fee arrangement or significantly increase the

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lawyer's compensation will generally be unreasonable (absent an unanticipated change in circumstances). In the Committee's words, "absent an unanticipated change in circumstances, attempts by a lawyer to change a fee arrangement to increase the lawyer's compensation are likely to be found unreasonable and unenforceable." *Id.* As such, "[t]he safest course remains for the lawyer to disclose in writing at the start of the engagement the likelihood of future periodic adjustments to fees and expenses, and to promptly advise the client in writing of the actual changes when they take effect." *Marcy Glen, Midstream Fee and Expense Modification, 40 The Colorado Lawyer 79, 83 (Aug. 2011).*

Client consent can be inferred when a law firm routinely increases its fees (for example, an annual increase), and the client is regularly billed by the firm on an hourly basis. In such cases, there is no need here to separately negotiate the fee increase with each firm client.

c. Securing the Fee

A lawyer may require security (a negotiable note or a mortgage) to insure the payment of a legal fee. *A.B.A. Formal Op. 02-427 (2002)*; *Rule 1.8(i)(1)*. "[T]here is nothing inherently unethical in a lawyer asking a client to provide security for payment of fees." *A.B.A. Formal Op. 02-427 (2002)*. Although a fee agreement generally is not considered a transaction of business with a client, a transaction to secure payment of the fee is considered a business transaction. *Rule 1.8 cmt. 16 (requiring a writing, signed by the client, setting forth that the client has been advised to seek the advice of independent counsel and given a reasonable opportunity to do so)*. Also, the A.B.A. has said the security interest can be the very property that is the subject of the litigation in which the lawyer represents the client. *Id.* Although *Rule 1.8(i)* prohibits a lawyer from acquiring a proprietary interest in the subject matter of the litigation, it allows an attorney to acquire a lien on that interest to secure the payment of the legal fee. Taking a deed to secure legal payment, with the lawyer as grantee, however, is improper because it deprives the client of the legal protections that accompany a mortgage foreclosure. *N.Y. State 550 (1983)*. After having performed the legal services, it is not improper to secure the fee with a client's confession of judgment. *N.Y. State 474 (1977)*. In addition, it is not improper to charge interest on a client's overdue bill, even though the retainer agreement does not expressly provide for interest. *N.Y.S.B.A. Ethics Op. 783 (2005)*.

An attorney's retainer agreement cannot require the attorney's approval as a condition for settlement of the case simply to ensure the ultimate payment of the attorney's fee. However, an attorney may secure their fee by having a client draft a promissory note, provided that the note does not include a confession of judgment or a discount for early payment. Confessions of judgment are not per se improper, but generally are permissible only after the services have been rendered. *N.Y. State 474 (1977)*; *A.B.A. Informal Op. 593 (1962)*.

3. Contingent Fees

A New Yorker asked William M. Evarts what he would charge for managing a certain law case caused by the city negligently leaving an open manhole cover. "Well," said Mr. Evarts, "I will take your case on a contingent fee." "And what is a contingent fee?" "My dear sir," said Mr. Evarts, mellifluously, "I will tell you what a contingent fee to a lawyer means. If you don't win your suit I get nothing. See? If I do win it you get nothing. See?" *Mark Twain et al., Wit and humor of the Age: Comprising Wit, Humor, Pathos, Ridicule, Satires, Dialects, Puns, Conundrums, Riddles Charades, Jokes and Magic 386-87 (Chicago Star Publ'g Co. 1883)*.

The man looked at the check he received after winning his suit against the city. "Wait a

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minute!” he said to his attorney. “This is only a third of the full amount!” “That’s right,” said the attorney. “I took the rest.” “You!” screamed the man. “I was the one who was hurt!” The attorney responded: “You forget. I provided the intelligence required to build the case, the expertise to find precedents, and the oratory to convince the jury. Any asshole could fall down a manhole.” *Jeff Rovin, 500 Great Lawyer Jokes 40 (1992).*

a. Generally

A contingent fee is conditioned on success. For example, the lawyer may earn one-third of the plaintiff’s recovery or a basic hourly fee plus a bonus for a favorable result. In either event, payment of the lawyer’s fee is based on a recovery by the plaintiff.

A contingent fee arrangement yielding a high fee to the attorney is not unreasonable if the case involved either a significant risk of non-recovery or a large expenditure of time. On the other hand, if little time is expended and there is no real risk of non-recovery for the client, such an arrangement may be unreasonable.

Reverse contingent fees are also permitted. This enables a defendant in a civil case to compensate a lawyer based upon the amount the client saved as a result of the lawyer’s successful defense of the suit. The amount demanded in the plaintiff’s complaint, however, should not be the *sole* basis for calculating a reverse contingent fee. *A.B.A. Formal Op. 93-373 (1993)*. The difference in the reverse contingent fee is that there is no res created (no money recovered) as there is in a normal contingent fee arrangement agreed to by a plaintiff. In a reverse contingent arrangement, the lawyer’s fee is measured by the amount a defendant saves rather than the amount a plaintiff recovers.

The reasonableness and appropriateness of a contingent fee arrangement is generally judged at the time the lawyer and client enter the arrangement. *A.B.A. Formal Op. 94-389 (1994)*; *A.B.A. Formal Op. 00-418, n.9 (2000)*; *Restatement (Third) of the Law Governing Lawyers* §§ 34 cmt. c & 35 (2000). Nevertheless, in appropriate cases, later events might also be relevant. *Restatement (Third) of the Law Governing Lawyers* § 34 cmt. c (2000); *Lawrence v. Miller*, 11 N.Y.3d 588, 596 (2009).

Most states limit the amount of the contingency fee in tort cases by statute.

- New York – maximum of one-third. 22 N.Y.C.R.R. § 603.7(e)(i). Medical malpractice arrangements are even more limited, declining from 30% of the first \$250,000 down to 10% on a verdict over \$1.25 million. *Judiciary Law* § 474-9.
- Connecticut – one-third of the first \$300,000, down to 10% on a verdict over \$1.25 million, but the client can waive this limitation and agree to one-third of the verdict. *Conn. Stat.* §§ 52-25, 52-25c(b), (c), (d), (e) & (f).
- New Jersey – a sliding scale from one-third to 20% on the verdict of up to \$2 million. *N.J. Court Rule* § 52-251c(b).
- Federal Tort Claims – 25% of any recovery. *Federal Tort Claims Act*, 28 U.S.C. § 2678.

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All contingent fee agreements shall be in a writing signed by the client. The agreement must “state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.” *Rule 1.5(c)*. Upon conclusion of the matter, the lawyer shall provide the client with a written statement regarding the financial outcome of the case and how the client’s share was determined. *Rule 1.5(c)*. If it is not clear how the fee is to be calculated, then all ambiguities are decided against the drafter [the attorney] and in the client’s favor.

It is not unethical to charge a contingent fee even when liability is conceded or clear and recovery is certain, provided the client is advised of alternative fee arrangements. The contingent fee may be applied to the total recovery, including any portion of the recovery that was the subject of an earlier settlement offer made directly to the client, which the client rejected before retaining the lawyer. Likewise, it is not unethical to charge a contingent fee that increases in its percentage (a) as the litigation proceeds or (b) as the recovery increases. *A.B.A. Formal Op. 94-389 (1994)*. The A.B.A. Ethics Committee did say, however, that there may be instances where a lawyer is so confident that a defendant will make an acceptable offer as soon as the case is filed that charging a contingent fee is not appropriate or reasonable. In this situation, where it cannot be said that the lawyer’s efforts brought substantial value to the client’s recovery, then the lawyer should charge a fee simply based on the time spent on the case. *Id.*

b. Contingent Fees Prohibited in Domestic Relations and Criminal Cases

Contingent fees in domestic relations and criminal matters are prohibited. *Rule 1.5(d)*.

In domestic relations cases, a lawyer may not charge a fee contingent on obtaining a divorce or based on the amount of alimony, equitable distribution, or child support recovered. *Rule 1.5(d)(1)*. Two basic policy considerations have led the vast majority of jurisdictions to invalidate contingent fees in divorce actions: (1) such arrangements tend to promote divorce, and (2) the need for such arrangements is lessened because most jurisdictions have enacted laws which permit a wronged spouse access to the other spouse’s funds in order to afford a lawyer, if the wrong spouse would otherwise be unable to afford one. Contingent fees have been condemned and prohibited in divorce cases because they are seen as pitting the lawyer’s interests against those of the parties and of society. A fee contingent upon the securing of a divorce gives the lawyer an interest in discouraging or thwarting reconciliation of the parties. A fee that is contingent upon the amount of support or the amount of a property settlement has the same effect. In addition, the lawyer would be encouraged to maximize the amount of support or property awarded to the client, perhaps sacrificing the client’s other interests (e.g., child custody or child support). *Florida Bar Ethics Op. 87-3 (1987)*; see *Rule 1.5(d)(1)*.

The Rules prohibit contingent fees only when the contingency is the securing of a divorce or the amount of alimony, support, or property settlement. Accordingly, the Florida Bar has held that a matrimonial lawyer can charge a fee that is contingent upon the court’s entry of a fee award to be paid by the other spouse.

A contingent fee for post-divorce collection of **past-due** alimony and **past-due** child support is permissible because a collection action is not a “matrimonial action, but simply a financial dispute.” *N.Y. State 443 (1976)*; see *Rule 1.5 cmt. 6*.

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In criminal cases, an accused murderer forfeits testate and intestate rights in the victim's estate, as well as property and life insurance rights, if found guilty of killing the deceased. A lawyer who agrees to a fee by taking a percentage of the criminal defendant's interest in the victim's estate or life insurance policy improperly agrees to a contingent fee in a criminal case.

EXAMPLE:

Client is indicted for grand larceny. She is accused of stealing \$100,000 in small, unmarked bills from a security truck. Client asks Attorney Alpha to defend her. Attorney Alpha suggests a fee of \$30,000 on condition that Attorney Alpha secures an acquittal for Client. If Attorney accepts this contingent fee arrangement, is Attorney subject to discipline?

HELD:

Yes. A lawyer shall not enter into an arrangement for a contingent fee for representing a defendant in a criminal case. *Rule 1.5(d)(2)*. There is the legitimate concern that a defense lawyer, whose contingent fee would be lost unless there is an acquittal, would be tempted to forego the plea bargaining process. This "all or nothing" trial strategy can severely prejudice the client. It discourages attorneys from seeking or even considering a plea for a lesser offense or from asserting an affirmative defense such as heat of passion to a murder charge, which may result in conviction of a lesser crime.

This prohibition against contingent fees in criminal matters extends also to quasi criminal matters, such as traffic violations and disorderly conduct violations.

If an attorney gets paid only if she obtains an outright acquittal or dismissal of all charges, she may experience a conflict of interest when faced with a plea [bargain offer] to reduce the charges, but the lawyer will lose her fee if she does. Similarly, at trial, if the attorney asks for [jury] instructions on lesser – included offenses, her client may avoid conviction on the top count, but again she will lose her fee.

New Jersey Sup. Ct. Advisory Ethics Op. 717 (2010).

4. Double Billing

Where an attorney has undertaken to bill a client on an hourly basis, the lawyer is never justified in charging a client for hours not actually expended. *A.B.A. Formal Op. 93-379 (1993)*. Double billing is simply irreconcilable with the lawyer's obligation to charge a reasonable fee.

Examples of prohibited double billing:

1. Lawyer spends a total of three hours in court for three clients on the same day, the same amount of time Lawyer would have spent if just one client was represented. May Lawyer bill three hours to each of the three clients? No, a lawyer who spends three hours of time on behalf of three clients has not earned nine billable hours; the lawyer should charge each client for one hour, for a total of three billable hours.

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2. Attorney Alpha flies to a distant city to attend a deposition for Client A. Instead of watching the movie during the flight, Alpha does legal research for Client B. Can Alpha bill the five-hour flight time to both A and B? No, a lawyer who has agreed to bill on an hourly basis is never justified in charging multiple clients for the same hour expended. The lawyer should charge one client or split his time between the multiple clients.
3. Can Attorney Alpha charge Client X for fourteen hours of legal research that Alpha did last year for another client, Client Y? No, a lawyer who saves time by reusing an old work product has not re-earned the hours previously billed and cannot again be compensated for time previously expended when the work product was first generated.

Likewise, although a lawyer may bill a client for costs expended in the client's matter (e.g., the cost of using Westlaw or Lexis, expert witnesses, travel expenses, or court reporters), the lawyer cannot tack on a surcharge to such costs. Similarly, the lawyer cannot charge for overhead expenses related to the normal upkeep of a law office. *A.B.A. Formal Op. 93-379 (1993)*. However, as discussed in Section E. 1. above, a lawyer may charge the client for a proportionate share of the operator's salary for in-house photocopying.

5. Fees Paid by Third Parties

A lawyer should not accept compensation or anything of value incident to legal employment or services from a person other than a client unless the client has full knowledge of such payments and gives express consent. Acceptance of such third-party compensation must be coupled with an understanding that the attorney owes no allegiance to the third party and that a client's confidential information may not be disclosed to the third party without the informed consent of the client. *Rules 1.6(a), 1.8(f), and 5.4(c); see also, infra, Chapter IV G.*

EXAMPLE:

When a lawyer is hired and paid by a liability insurance company, the insured is the attorney's client, not the insurance company. Assume the insurance policy permits the insurance company to control the defense and settlement of the claim in its sole discretion without consultation with the insured. What should a lawyer do if a disagreement arises between the insurer and insured about whether to settle?

First, upon undertaking the representation, the lawyer must immediately communicate with the insured regarding the limits of the lawyer's representation. Second, the lawyer should advise the insured that the insured's rejection of the settlement may result in forfeiture of the insured's rights under the policy. If the insured objects to the settlement, the lawyer cannot participate in a settlement on behalf of the insured. *A.B.A. Formal Op. 96-401 (1996); see generally, infra, Chapter IV at G.*

6. Division of Fees Among Lawyers

A lawyer may share a legal fee with another lawyer who is not in the same law firm under the following circumstances:

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1. The client consents in writing to the fee sharing arrangement, including the share each lawyer will receive;
2. The division of the fee is in proportion to the services performed by each lawyer, or the financial and ethical responsibilities for the client's matter are jointly and severally assumed by each lawyer, as if the lawyers were in a partnership (as discussed in Rule 1.5 comment 7); *ABA Formal Op. 474 (2016)*; and
3. The total fee does not clearly exceed reasonable compensation for all legal services rendered to the client. *Rule 1.5(e)(3)*.

“Where an attorney merely brings about the employment of another attorney but renders no service and assumes no responsibility in the matter, a division of fees is improper.” *A.B.A. Formal Op. 204 (1940)*; *Nicholson v. Nason & Cohen*, 192 A.D.2d 473 (1st Dep’t 1993). Although an automatic referral fee is discouraged, many courts continue to uphold such arrangements as valid and enforceable notwithstanding their ethical impropriety, provided the referring lawyer does some work or assumes some of the legal malpractice liability and/or ethical responsibility for the case. *Oberman v. Reilly*, 66 A.D.2d 686 (2d Dep’t 1978). The New York Court of Appeals estops a lawyer from arguing that a fee agreement should not be enforced because it does not comply with the ethics rules. A lawyer “who is bound by the same Code of Professional Responsibility . . . cannot be heard to argue that the fee sharing agreement and the obligations thereunder must be voided on ethical grounds, when he freely agreed to be bound by and received the benefit of the same [referral] agreement, particularly where, as here, there is no indication that the client was in any way deceived” *Samuel v. Druckman & Sinel*, 12 N.Y.3d 205, 210 (2009); *In Accord, Marin v. Constitution Realty, LLC*, 38 N.Y.3d ____ (2-9-17).

EXAMPLE:

Two attorneys practiced law together as partners for more than 10 years. When they dissolved their partnership, Attorney A retained all the files and agreed to pay Attorney B a ratable portion of the fee charged to each client upon resolution of the case. Is Attorney A subject to disciplinary action?

HELD:

No. The Rules do not prohibit payment to a former partner or associate pursuant to a firm dissolution or retirement agreement.

EXAMPLE:

If a law student refers a case to the law firm where she is working, can she receive a specified percentage of the fee earned if she works on the case and the client agrees?

HELD:

No, a lawyer cannot share legal fees with a nonlawyer. *Rule 5.4(a)*. A law student, not admitted to the Bar, is deemed a nonlawyer. *See Philadelphia Bar Ass’n Op. 87-6 (1987)*.

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QUERY:

Can a lawyer who has taken a case pro bono at the request of a nonprofit organization pass any court-awarded attorney fees over to that organization? Yes, because the fee is awarded by the court and is not paid by the client. *Rule 5.4(a)(4)*. The fee, said the American Bar Association, arises out of litigation that serves a public interest. The arrangement to pass on the fees must be disclosed to the client. *A.B.A. Formal Op. 93-374 (1993)*.

A lawyer should only refer a matter to a lawyer whom the referring lawyer believes is competent to handle the matter. *See Rule 1.6 cmt. 7*.

Unless a client gives informed consent, confirmed in writing within a reasonable time after commencement of the representation, and not at its end, a lawyer may not accept a referral fee when a lawyer has a conflict of interest in the referred case that would prevent the lawyer from ethically performing legal services in the matter or assuming joint responsibility for the matter. *ABA Formal Op. 474 (2016)*.

“[B]efore a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client. . . .” *Rule 1.1 cmt. [6]*.

EXAMPLE

Attorney Alpha represents Flower shop owned by Daisy and Rose. Rose, while using the van owned by Flower Shop was in an accident with Smith. Rose was injured. Rose asked Alpha to refer her to a competent personal injury lawyer. Rose would like to see Alpha get a referral fee. Alpha realizes that if Rose sues Smith, Smith may implead the Flower Shop. Alpha now believes there is significant risk that Alpha’s representation of Rose will be materially limited by Alpha’s responsibilities to Flower Shop, and vice versa. Accordingly, in order to receive a referral fee for referring Rose to the personal injury lawyer, Alpha must meet the requests of Rule 1.7(b). Accordingly, Rose and the Flower Shop must give informed consent, confirmed in a writing within a reasonable time after commencement of the representation.

7. Legal Expenses

The key here is “reasonable” expenses. The lawyer can charge a reasonable amount for in-house expenses, as long as such expenses are agreed to in advance. These expenses, usually set forth in the retainer agreement, include copying, telephone charges, and/or computer research (e.g., research on Westlaw or Lexis). If there has been no prior agreement with the client as to reimbursable costs, then the client can only be charged for the actual cost incurred by the firm. *Rule 1.5 cmt. 1*.

EXAMPLE:

In addition to the cost of the attorney or paralegal’s time spent on performing computerized legal research, can the law firm bill the Westlaw cost to the client?

Yes, but only for the firm's actual cost, unless a higher fee has been agreed to previously. For example, if the firm pays a fixed monthly fee month for 100 hours of Westlaw access and the client's legal research time was 25 hours, then the firm can only charge the client for one-quarter of the Westlaw monthly fee. The firm cannot make a profit on the firm's own costs, unless the client agreed in the retainer agreement that computer costs paid to a third party would be billed at a higher rate than the firm's actual cost. *A.B.A. Formal Op. 93-379 (1993)*.

Most practitioners agree that the best practice is to build routine computerized research, postage, and copying costs into the firm's overhead. An attorney who breaks out every single cost is viewed by a client as milking every possible dollar out of the client.

8. Charging Liens

A charging lien attaches to a client's recovery from an action in which an attorney rendered services to produce the recovery. A charging lien cannot be asserted for prior services on matters unrelated to the litigation from which the recovery arises. Thus, an attorney cannot assert a charging lien in a negligence case for amounts due in an earlier real estate matter. When the retainer agreement is signed, the attorney has a vested property interest in the resulting judgment and that property interest cannot subsequently be disturbed by the client or anyone else (e.g., another attorney) claiming through or against the client.

An attorney's charging lien may be lost if the attorney voluntarily withdraws from the action without just cause or is discharged by the client for cause. *Goldman v. Rafel Estates*, 269 App. Div. 647 (1st Dep't 1945). Generally, however, if an attorney is discharged without cause before the matter is concluded and monies are recovered, a charging lien may be levied on the proceeds of the recovery in an amount to be determined by the court on a quantum meruit basis at the conclusion of the case. "Only if the client and [the discharged] attorney agree may the attorney receive a fee based on a percentage of the recovery." *Cohen v. Grainger, Tesorier & Bell*, 81 N.Y.2d 655 (1993). It is settled that a client may discharge an attorney at any time with or without cause. An attorney discharged without cause may immediately recover the fair and reasonable value of the services rendered computed on a quantum meruit basis.

The charging lien is predicated on the idea that the attorney has, by his skill and effort, obtained [in whole or in part] the judgment, and hence should have a lien thereon for his compensation, in analogy to the lien which a mechanic has upon any article which he manufactures. *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171 (2d Cir. 2001).

9. Forbidden Client-Lawyer Arrangements

Generally, a client may not assign to the lawyer a proprietary interest in the cause of action or subject matter of the litigation, except that the lawyer (a) may acquire a lien authorized by law to secure a legal fee or litigation expenses, or (b) in a civil case, the attorney may contract with a client for a reasonable contingent fee. *Rule 1.8*. This rule is designed to prevent a lawyer from purchasing all or a part of a client's claim. This rule does not, however, prevent a lawyer involved in the client's nonlitigation and nonadministrative business proceedings from receiving as a fee an interest in the client's business, e.g., the payment of shares of stock for a lawyer's pre-incorporation services for the corporate client.

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EXAMPLE:

Client was in a serious auto accident and retained Alpha to sue the driver who negligently caused the accident. While awaiting trial, Client asked Alpha for a loan. Alpha declined, citing Rule 1.8(e), which provides that “[a] lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation” A lawyer may not lend money to a client for living expenses, because, for example, if a client owes money to her lawyer, the lawyer may have the lawyer’s own financial interest in mind while handling the litigation rather than the client’s best interest. *Shea v. Va. State Bar*, 374 S.E.2d 63, 64 (Va. 1988); *State ex rel. Oklahoma Bar Ass’n v. Smolen*, 837 P.2d 894, 896 n.5 (Okla. 1992).

The rationale for prohibiting loans to clients in litigation matters is to prevent “(1) clients from selecting a lawyer based on improper factors, and (2) conflicts of interest, including compromising a lawyer’s independent judgment in the case and creating the potentially conflicting roles of lawyer as both lawyer and creditor with divergent interests.” *State ex rel. Oklahoma Bar Ass’n v. Smolen*, 17 P.3d 456 (Okla. 2000).

A lawyer may advance or guarantee the expenses of litigation, such as costs of hiring private investigators, expert witnesses, stenographers, medical examinations, and court costs. *Rule 1.8(e)(1)*. Indeed, if a client is indigent, a lawyer may pay these court expenses outright. “[A] lawyer representing an indigent client may *pay* [not just advance as a loan] court costs and expenses of litigation on behalf of the client.” *Rule 1.8(e)(2)*. Under Restatement (Third) of the Law Governing Lawyers § 36(2), the duty to repay can be absolute or conditional on the success of the client’s claim. “Requiring the client to refund such expenses regardless of success would have a particularly crippling effect on class actions, where the named plaintiffs often have financial stakes much smaller than the litigation expenses.” *Restatement (Third) of the Law Governing Lawyers* § 36 cmt. c.

A lawyer may not enter or negotiate an agreement that gives the lawyer an interest in media or publication rights with respect to the subject matter of the lawyer’s legal employment prior to the conclusion of all aspects of the matter giving rise to legal employment. *Rule 1.8(d)*.

EXAMPLE:

A wealthy businessman was accused of murdering his wife with an ax so that he could run off with paramour. After his indictment, he retained Alpha, his trusted friend and attorney for many years. Before he went to trial, the client suggested in satisfaction of Alpha’s legal fee, that Alpha take copious notes and write a book about his trial. The client and Alpha agreed that Alpha would have exclusive literary and film rights to the story. Is Alpha subject to discipline?

Yes. Such an arrangement clearly violates Rule 1.8(d).

10. Forfeiture of Legal Fee

Similar to agency rules dictating that a faithless agent who violates a fiduciary duty forfeits his or her right to a fee, a lawyer who clearly and flagrantly violates a duty owed to a client may be required to forfeit all or part of the legal fee paid or owed. *Restatement (Third) of the Law*

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Governing Lawyers § 37 (2000); Restatement (Second) of Agency § 469. For example, where an attorney attempted to represent both the injured passenger and driver involved in a collision, the representation of parties with conflicting interests resulted in forfeiture of any legal fee to that attorney. *Quinn v. Walsh*, 18 A.D.3d 638 (2d Dep’t 2005).

If a lawyer is found to have breached the fiduciary duty owed to a client, then even in the absence of any injury to the client then under the “faithless servant” rule of agency law, the lawyer must disgorge all of the legal fees received. 44 *Hofstra L. Rev.* 291, 292 n.2 (2015).

Similarly, under contract law, the lawyer’s improper conduct may rise to a material breach of attorney-client contract, rendering the fee payment provisions unenforceable.

A lawyer forfeits his entire fee due to misconduct only where the misconduct relates to the legal representation for which the fees are sought. *Decolator, Cohen & DiPrisco, LLP v. Lysoght*, 304 A.D.2d 86, 91 (1st Dep’t 2003). “Some violations are inadvertent or do not significantly harm the client [and can be remedied through a partial forfeiture]. Denying the lawyer all compensation would sometimes be an excessive sanction, giving a windfall to a client.” *Restatement (Third) of the Law Governing Lawyers § 37 cmt. b (2000).*

11. Collecting the Fee

A lawyer seeking to recover a legal fee owed must comply with all debt collection laws, may not improperly use a client’s confidential information, and, of course, may not harass or intimidate a client during the collection process. *Restatement (Third) of the Law Governing Lawyers § 41 (2000).*

To rebut the client’s claim that the lawyer spent too much time on the client’s matter, a lawyer may reveal a client’s confidential conversation to show that the lawyer’s time was warranted on the client’s matter. A lawyer may reveal relevant and necessary confidential information to establish a claim or defense in a controversy with the client, or confidential knowledge of a client’s assets when necessary to attach those assets in the fee collection process. *Rule 1.6(b).*

Keep in mind that a lawyer may not threaten to disclose client confidential information to intimidate a client into settling with the lawyer. The disclosed information must be limited to that information relevant to the collection of the fee.

12. Third Party’s Interest in a Client’s Recovery

A third party’s interest in a client’s recovery frequently arises in personal injury litigation (e.g., when Medicaid, Medicare or, under a state’s workers’ compensation lien arising from payment of the clients medical bills and a lien arises by operation of law upon any sums recovered by the plaintiff). Likewise, a medical lien arises when the plaintiff’s lawyer sends a letter to the plaintiff’s medical provider promising payment from any recovery to induce the provider to continue treating the plaintiff. The third party’s interest must be identified by a lien, court order, or contract. Once the matter is settled or a verdict obtained and the check is sent to the plaintiff’s lawyer, the lawyer is obligated, under Rule 1.15(d), to deposit the check into the lawyer’s escrow account. The lawyer must then promptly notify the client and any third person who has a legal interest in the funds, properly deliver the undisputed amount to the client and/or third person entitled to them (unless the amount or lien is disputed), and, upon request, render an accounting regarding the funds.

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Restatement (Third) of the Law Governing Lawyers §§ 44(2) and 45(1) (2000). The lawyer must keep any disputed funds in escrow and cannot unilaterally assume to arbitrate a dispute between a client and a third party. However, the lawyer may commence an interpleader action naming the client and the third party in order to have court resolve the dispute. *Rule 1.15 cmt. 4; see Chapter VIII B., infra, regarding client property.*

If a lawyer knows of the third party's interest in the client's recovered funds, and instead releases the money to the client, then the lawyer is civilly liable to the third party for any resulting loss. *Restatement (Third) of the Law Governing Lawyers* § 45 cmt. d (2000).

13. Arbitration of Legal Fee Disputes

Attorneys can provide in the original retainer agreement that disputes as to legal fees or claims of legal malpractice must be decided by binding arbitration, provided that the client gives informed consent after the risks and benefits of arbitration have been fully explained to the client in writing. *A.B.A. Formal Op. 02-425 (2002)*. The A.B.A. has concluded that arbitration does not violate Rule 1.8(h)'s prohibition on lawyers' prospective limitations on malpractice liability, but rather it simply prescribes a procedure to resolve such claims. *Id.*

The A.B.A. committee notes that it is the attorney's duty to fully explain in writing the differences between the two dispute resolution methods and the possible benefits and drawbacks of arbitration so that the client can give "informed consent."

CHAPTER III

CONFIDENTIAL CLIENT INFORMATION

A. ATTORNEY-CLIENT EVIDENTIARY PRIVILEGE

1. Generally

The attorney-client privilege is the oldest of the privileges pertaining to confidential communications. *Edward J. Imwinkelried, The New Wigmore: Evidentiary Privileges* § 6.2.4 at 471 (2002). “The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.” *Trammel v. United States*, 445 U.S. 40, 51 (1980). The privilege belongs to the client; it is the client’s right to assert it or to waive it.

The availability of the privilege depends upon the definition of various terms, including the definitions of the two persons for whom the privilege exists: the lawyer and the client. A lawyer is defined as a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation. Whether the lawyer is actually admitted or is legally practicing should be of no consequence where the client reasonably believes that the person consulted is an attorney. Reasonableness will depend, of course, on the circumstances.

A client is generally defined as a person, public officer, corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer. *See Michael H. Graham, 3 Handbook of Fed. Evid. § 503:3 (7th ed. 2011) (defining the term “client” consistently with many state codes)*. As is apparent from the quoted language, “client” is very broadly defined, since the availability of the privilege is not based upon distinctions in legal status. The United States Supreme Court adhered to this broad definition of “client” in the corporate context, ruling that the privilege includes not only the “control group” of a corporation but also lower echelon employees who communicate with the corporation’s attorney concerning matters germane to the employees’ corporate duties. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

A privileged communication between an attorney and client is a confidence. A confidence is defined as “information protected by the attorney-client privilege under applicable law.” *81 Am. Jur.2d Witnesses* § 361 n.4; *see also U.S. ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics, Inc., No. 05 Civ. 5393(RPP) (S.D.N.Y. Apr. 5, 2011)*. A communication between attorney and client will be deemed a confidence and, thus, subject to the attorney-client privilege, only if:

1. the information is relevant to the legal problem involved;
2. the communication between the client and the attorney is confidential, and, in fact, was kept confidential (the presence of an unnecessary third person generally will destroy the privilege); and

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3. the communication is made by the client to the attorney in the attorney's capacity as a lawyer, for the purpose of obtaining legal advice, or by the attorney in furtherance of providing legal advice. 8 *J. Wigmore, Evidence* § 2292 (*J. McNaughton rev. 1961*); *Restatement (Third) of the Law Governing Lawyers* § 72 (2000).

The attorney-client privilege attaches at the time of the initial professional consultation. Any disclosures made with a view toward obtaining professional legal services constitute privileged communications, even if no lawyer-client relationship actually ensues. *Rule 1.18(b)*. However, note that the privilege will only attach if the person is consulting the lawyer for the purpose of obtaining legal services. *See Rule 1.18 cmt. 2*. As such, the privilege will not attach to communications with a lawyer acting as an accountant or a business advisor because the lawyer is not acting in his or her professional capacity as a lawyer. For example, an accountant/lawyer who simply prepares financial statements or performs an audit is not rendering legal services entitled to any privilege. Similarly:

If a lawyer participates with a partner in a business deal, even though he may be rendering legal advice, his relationship is that of business [person], not lawyer. Payment of the legal fee in a piece of the business, either by stock ownership or a percentage of profits, makes the lawyer a part of the enterprise rather than legal counsel for purposes of the privilege. Ethical considerations require the client to be informed that the business relationship negates the privilege. *Jack B. Weinstein, Weinstein's Evidence Manual*, 503(a)(1) at 503-21.

EXAMPLE:

The attorney-client privilege does not apply to testimony concerning the general nature of the legal services rendered. Therefore, an attorney may be compelled to testify before a grand jury and provide non-confidential information. *United States v. Mackey*, 405 F. Supp. 854 (E.D.N.Y. 1975) (*holding that communications with the lawyer who incorporated the corporation and filed the certificate of incorporation were not privileged*).

A representative of an attorney is one who is engaged by the attorney to assist in providing legal services. Communications with a lawyer's representative may be privileged, even though the client made them outside the lawyer's presence. *Cf. In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982) (*holding that disclosure of a corporation's business ethics report, to counsel for an underwriter, in connection with a public offering of securities, constituted a waiver of the attorney-client privilege*). Thus, confidential communications to an attorney through his secretary or paralegal are privileged. *See Rule 1.6 annot. (2015)* (*under the heading "Acting Competently to Preserve Confidentiality"*); *see also Rule 5.3 cmt. 1* (*cautioning attorneys to advise nonlawyer assistants with respect to the ethical aspects of their employment*). Similarly, even though an accountant-client privilege may not be available, client communications to an accountant engaged by the attorney for the purpose of assisting the attorney in rendering legal services are privileged.

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The privilege only protects “confidential communications,” which are communications made in furtherance of obtaining legal advice or assistance, not intended to be disclosed to third persons (unless those third persons are assisting the attorney in rendering professional legal services). *See generally Rule 1.6 annot. (2015)*. Thus, if the client makes what would otherwise be a privileged statement in the presence of an unnecessary third person, the client may have waived the privilege, unless the person’s presence was reasonably necessary for the transmission of the communication. *Id.*

For example, the presence of the attorney’s secretary or clerk would be “reasonably necessary” and the privilege in such situation would remain intact. But the same statements made to an attorney’s representative in front of an unnecessary third person (e.g., the client’s friend or relative accompanying the client to provide emotional, moral, or financial support) destroys its confidentiality. *People v. Mitchell*, 58 N.Y.2d 368, 375 (1983).

Where the third person present is an agent for the client or for the lawyer, the otherwise privileged communication does not shed its privilege protection (e.g., where a client or a lawyer asks an accountant to come to a meeting with the lawyer and client to better explain the client’s tax problem). *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *Delta Fin. Corp. v. Morrison*, 13 Misc. 3d 441 (Sup. Ct. Nassau County 2006). The privilege likewise extends to an agent retained by the attorney to perform a factual investigation permitting the attorney to more effectively “sift[] through the facts with an eye to the legally relevant.” *In re Allen*, 106 F.3d 582, 601 (4th Cir. 1997). Thus, the privilege is not lost if the attorney hires an expert (engineer, investigator, or architect) to assist the lawyer in preparing the case. *Restatement (Third) of the Law Governing Lawyers* § 70 cmt. g (2000). Also, an incarcerated client can use a trusted friend to deliver a message to the client’s lawyer and the friend, as the client’s agent, can assert the attorney-client privilege on behalf of the client.

Depending on the jurisdiction, simply bringing a spouse along to an attorney-client meeting may destroy the privilege. In New York, for example, CPLR 4502 protects spouses from disclosing their confidential communications with each other which were made during the marriage, but communications between an attorney and client generally are not privileged if the client’s spouse is present during the conversation. 9 *Weinstein-Korn-Miller*; CPLR 4503.16; *In re Horowitz*, 16 Misc.3d 1106(A) (2007). On the other hand, in jurisdictions that recognize the husband-wife privilege, the two privileges (husband-wife and attorney-client) protect the confidentiality of the meeting. *Restatement (Third) of the Law Governing Lawyers* § 71 cmt. b (2000); *The New Wigmore: Evidentiary Privileges* § 6.8.1 (2002). However, where a client discloses a prior attorney-client communication to a spouse, the disclosure is protected by the husband-wife privilege. *See Solomon v. Scientific American Inc.*, 125F.R.D. 34 (S.D.N.Y. 1988); *Matter of Pretino*, 150 Misc.2d 371 (Sur. Ct. Nassau County 1991).

Under the general rule, the attorney-client privilege does not attach when a defendant communicates with his/her attorney in the presence of a co-defendant. However, if the co-defendants are presenting a common defense, their statements to counsel made in preparation of that common defense are privileged. *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989); *People v. Osorio*, 75 N.Y.2d 80 (1989).

Another exception is the common interest or joint defense doctrine in civil or criminal cases. Where two or more clients separately retain counsel to advise them on matters of common legal

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interest, then this shields attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest.

Presence of an eavesdropper does not destroy the confidentiality of a communication to a lawyer because the client is only prevented from asserting the privilege if the circumstances demonstrate that the client did not intend the communication to be confidential. Because an eavesdropper is, by definition, one who hears the communication unbeknownst to the communicants, the eavesdropper's presence is in no way a reflection of the client's intentions. However, speaking with a lawyer in a loud voice in a public courthouse hallway is not a confidential communication. For the communication to be confidential and privileged, the parties participating in the communication must objectively and reasonably believe the discussion cannot be overheard by a third person.

Likewise, a communication is not privileged if a client expects or intends that the communication will be embodied in a pleading or will be repeated by the attorney to a non-privileged third person, in court, or during negotiations. *In re Grand Jury Proceeding (John Doe)*, 727 F.2d 1352 (4th Cir. 1984). Where confidential attorney-client communications are revealed during depositions without objection from counsel, the privilege is waived with respect to all communications on the same subject matter. Moreover, where a party allows another party to examine its files, the attorney-client privilege is waived with respect to any privileged documents in those files. *In re National Trade Corp.*, 76 B.R. 646 (N.D. Ill. 1987); cf. *Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392 (4th Dep't 1987).

EXAMPLE:

In a tape recording made for the client's best friend, the client fully confessed to a murder. If the tape is turned over to the lawyer, it is not protected and is discoverable by the People, even if the friend declined to listen to it, because the tape was not intended by the client to be a confidential communication to an attorney.

EXAMPLE:

While in custody at the local jail, the client blurted out a confession on a telephone call to his lawyer in the presence of a police officer who was just walking out of the room ("Oh my God, I think I've killed Hy"). The officer's obvious presence made the communication nonconfidential and, thus, not subject to any privilege. *People v. Harris*, 57 N.Y.2d 335 (1982). "[T]he officer had no opportunity to remove himself from earshot before [the defendant] made the damaging statement [The attorney-client] privilege protects those communications made by a defendant to an attorney that are intended to be confidential. It cannot be said . . . that [the defendant], in speaking over the telephone to a lawyer in the known presence of [] a police officer . . . intended this communication to be confidential. Generally, communications made in the presence of third parties, whose presence is known to the defendant, are not privileged from disclosure" (internal citations and footnotes omitted). *Id.* at 342-43.

Similarly, while the defendant was in jail awaiting trial, he called his sister with instructions for his lawyer using a phone line monitored by the Bureau of Prisons, even though he knew the conversation was being recorded. The Bureau of Prisons provided prisoners with an unrecorded,

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private line for prisoners' conversations with lawyers. The court concluded that the attorney-client privilege did not protect the communications because of the lack of confidentiality. *U.S. v. Mejia*, 655 F.3d 126 (2d Cir. 2011).

A defendant may waive the attorney-client privilege when the defendant testifies to a claim that requires examination of a protected communication. For example, when a defendant in a securities fraud case testified that he acted in good faith when he filed disclosure statements with the Securities and Exchange Commission, that defendant may waive the attorney-client privilege with respect to prior conversations with his attorney related to the filing of those documents. *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991).

Death of a client does not waive the attorney-client privilege. *Swindler & Berlin v. U.S.*, 118 S. Ct. 2081 (1998). In a brief opinion, the United States Supreme Court rejected the argument that a client's death should unseal the lawyer's lips where testimony is not available from other sources. *Id.*

The privilege continues indefinitely, even after termination of the lawyer's services. *Rule 1.6 cmt. 18*. Thus, although the duty of loyalty prospectively ceases when the attorney-client relationship ends, the duty of confidentiality and the attorney-client privilege continue forever.

What if a client reveals to the lawyer the commission of a prior crime which would exonerate another person who was charged or convicted of that noncapital crime? Even if the client dies, the information is still confidential unless the other accused has been wrongfully convicted and faces the death penalty. *Rule 1.6 cmt. [6B]*.

Also, "[w]here there is reason to believe that the now deceased client would have wanted the [person charged or convicted] to be exonerated under the current circumstances, the concept of implied authorization to disclose in Rule 1.6(a)(2) may permit the lawyer to make such disclosure. . . ." *N.Y. State Bar Ass'n Op. 1084 (1-22-16)*.

"Rule 1.6(b)(1) does not permit disclosure of confidential information to prevent wrongful incarceration but permits disclosure to prevent reasonably certain death" *Id.*

The attorney-client privilege protects verbal and written communications, not a client's non-verbal appearance, demeanor, or mental state. "Excluded from the [attorney-client] privilege . . . are physical characteristics of the client, such as his complexion, his demeanor, his bearing, his sobriety and his dress. Such things are observable by anyone" *United States v. Kendrick*, 331 F.2d 110, 113-14 (4th Cir. 1964).

EXAMPLE:

Late one night, after hastily arranging to meet his attorney at the attorney's law office, the client arrived wearing a blood-stained shirt. What the attorney observed is not protected by the attorney-client privilege because the appearance of his client's shirt is not a communication protected by the privilege (it is just a fact). "[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing" (internal quotations omitted). *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981).

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Documents that come into existence as a result of confidential communications between the attorney and client are privileged. However, documents that existed prior to the inception of the attorney-client relationship are not privileged unless they were privileged when in the hands of the client and were transferred to the attorney for safekeeping. *Fisher v. United States*, 425 U.S. 391 (1976).

EXAMPLE:

A taxpayer cannot conceal his canceled checks from the I.R.S. by handing them over to the attorney. Checks that are not privileged in the hands of the taxpayer do not become so by simply because they were placed into the hands of the attorney.

EXAMPLE:

Where a criminal suspect makes a tape recording just prior to an unsuccessful attempt at suicide and the tape is delivered to his attorney, the lawyer cannot be compelled to produce the tape because it would have been privileged material (under the Fifth Amendment) if it had remained in the client's possession. *In re Vanderbilt*, 57 N.Y.2d 66 (1982).

2. Exceptions to the Privilege

The attorney-client privilege is subject to the following exceptions:

1. Where the attorney was consulted or the attorney's services were sought for the purpose of obtaining assistance to aid in the commission of a crime or civil fraud, the privilege will not be available. *Linde v. Arab Bank, PLC*, 608 F. Supp. 2d 351, 357 (Magistrate Pohorelsky, E.D.N.Y. 2009); see Rule 1.6(b)(2); see also Rule 1.6 annot. (2015) (under the heading "Subsection (b)(2): Disclosure to Prevent Client from Committing Crime or Fraud Resulting in Financial Injury or Property Damage"). Note that this exception only applies where there is probable cause to believe that a communication was intended to conceal or facilitate a crime (not merely that the client communicated with the attorney while engaged in criminal activity). Whether the privilege should be waived on the "crime-fraud" basis frequently is determined by an in camera review of the evidence. *United States v. Zolin*, 491 U.S. 554 (1989); *In re Public Defender Service*, 831 A.D.2d 890 (D.C. 2003).

Rule 1.6(b)(2) (amended in 2003) permits, but does not require, a lawyer to reveal client confidences "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."

2. Where the attorney is consulted or retained by two or more clients, the privilege cannot be invoked for communications made to the attorney retained in common where litigation ensues between any of the clients.
3. Under the "self defense" exception, the lawyer may reveal confidential communications to the extent he believes it reasonably necessary to defend against a

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civil or criminal charge brought against him (e.g., in an action between the attorney and client where the communication is relevant to a breach of duty by either the attorney or the client, such as in a malpractice action or fee dispute. *Rule 1.6(b)(5)*. This self defense rule also applies to third party claims against the attorney (e.g., claims by a prosecutor or regulatory agency alleging accomplice liability or obstructing justice charges arising out of the attorney's representation of the client). *Rule 1.6 cmt. 10*.

4. Where the parties to an action are claimants through the same deceased client, the privilege is not available to the decedent's lawyer. This exception frequently arises in determining the decedent's intent vis-a-vis intestate, testate, or inter vivos gifts. These disputes frequently involve calling upon the decedent's lawyer to shed light on the deceased client's intent involving different parties claiming an interest through the same decedent. *Restatement (Third) of the Law Governing Lawyers § 81 (2000)*.
5. Where the party claiming the privilege is also asserting an affirmative defense and the privileged communication is the basis of the affirmative defense, the privilege is waived. *Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975)*.
6. The privilege generally is inapplicable to the lawyer's disclosure of the mere identity of the client. Thus, where an anonymous taxpayer gives his attorney a sum of money to pay the I.R.S., the client's identity is not privileged. *Gannet v. First Nat. State Bank of New Jersey, 546 F.2d 1072 (3d Cir.1976), cert. denied, 431 U.S. 954 (1977); In re Grand Jury Subpoena (Slotnick), 781 F.2d 238 (2d Cir. 1986) (en banc), cert. denied, 475 U.S. 1108 (1986); cf. Matter of D'Alessio v. Gilberg, 205 A.D.2d 8, 11-12 (2d Dep't 1994) ("[A]t bar, the client consulted the attorney in connection with his or her involvement in a fatal hit-and-run accident. Disclosure of his identity would reveal his possible involvement in a crime in connection with that accident, which is the precise situation for which he sought legal advice. Under these circumstances his or her identity constitutes a confidential communication, the disclosure of which is prohibited by the dictates of the attorney-client privilege")*.
7. A fee arrangement, who paid it, and the amount paid generally do not constitute confidential communications because they have "no direct relevance to the legal advice to be given. [They are] collateral matter[s] which, unlike communications which relate to the subject matter of the attorney's professional employment, [are] not privileged." *Priest v. Hennessy, 51 N.Y.2d 62, 69-70 (1980); see also In re Grand Jury Subpoena (Slotnick), 781 F.2d at 247*.
8. Where the client voluntarily discloses the confidential communication with the lawyer to a third person, the confidentiality is breached and the attorney-client privilege is waived. *In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982); Restatement (Third) of the Law Governing Lawyers § 79 (2000)*.

EXAMPLE:

On cross-examination, at a deposition or at trial, a client is asked if his version given at that time is the same version the client earlier gave to his lawyer. If the client answers in the affirmative, then even though the conversation between the client and

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his lawyer was confidential, the client voluntarily waives the privilege by revealing the substance of the communication to a third person.

EXAMPLE:

If someone breaks into a lawyer's law office, steals confidential documents, and mails them to the client's opponents, this disclosure does not waive the attorney-client privilege because the disclosure was not voluntarily made by the client. Likewise, if the court orders disclosure of a conversation or documents protected by the attorney-client privilege, the court-ordered disclosure is not voluntary and the issue of privilege can be raised in a subsequent appeal. *See Rule 1.6(b)(6); see also Rule 1.6 cmt. 13 (in such a situation, ". . . the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law")*.

EXAMPLE:

If a witness refreshes her recollection just prior to trial with a document protected by the attorney-client privilege, then, on the witness's cross-examination, the witness can be asked to produce the document. This is permissible under the Federal Rules of Evidence (Rule 612(b)) for purposes of impeaching the witness through possible prior inconsistent statements.

9. Under the fiduciary exception, most pre-litigation attorney-client communications between a trustee, escrow agent, pension plan manager, or corporate officer or director and the attorney are now subject to pretrial discovery by those to whom the fiduciary duty was owed (e.g., the estate or trust beneficiary, or the corporate shareholder charging breach of fiduciary duty). The purpose of such exception is to ensure that the interests of corporate shareholders or trust beneficiaries are fully protected against a fiduciary's misconduct. *United States v. Jicarilla Apache Nation* 131 S. Ct. 2313 (2011); *Hoopes v. Carota*, 74 N.Y.2d 716 (1989); *United States v. Evans*, 796 F.2d 264, 266 (9th Cir. 1986).
10. The protection of the attorney-client privilege extends only to communications, and not to facts. Thus, at a deposition, a client could not be asked if he told his lawyer he had sex with the office intern (a protected communication), but the client may properly be asked directly about whether he committed the act (a non-protected fact).
11. The attorney-client privilege can be waived by the client. Note that if the client declares bankruptcy, the authority to waive the privilege passes to the trustee in bankruptcy. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 351-53 (1985).
12. Communications with a lawyer for the purpose of disqualifying that lawyer from handling any adverse representation in the matter will not prevent that lawyer from subsequently representing another party in the matter, as a party who speaks to an attorney for the sole purpose of intentionally disqualifying the attorney is not considered a prospective client. *Ronald D. Rotunda, Legal Ethics § 1.18-1 at 738-*

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740 (2015-2016 ed.); Geoffrey C. Hazard, Jr., & W. William Hodes, *The Law of Lawyering* §13.9 (3d ed. 2001) (“Courts have had little difficulty seeing through this ruse, typically holding that inasmuch as the consultation was not for the purpose of obtaining legal services, any information disclosed did not fall under the protection of the confidentiality or former client rules.” (citing *Hughes v. Paine, Webber, Jackson and Curtis, Inc.*, 565 F. Supp. 663 (N.D. Ill. 1983))). This practice is referred to as “taint shopping,” and such communications are not protected. See *Rule 1.18 annot.* (2015) (under the heading “Good Faith”); *Rule 1.18 cmt. 2*. A lawyer who advises a client to do this is subject to discipline because such conduct is prejudicial to the administration of justice. *Rule 8.4(d)*.

If a client consults a lawyer solely in order to disqualify that lawyer or the lawyer’s law firm from representing anyone else in the matter, the court may consider the client’s lack of good faith in determining the disqualification motion. *In re American Airlines, Inc.*, 972 F.2d 605, 613 (5th Cir. 1992). “The rule barring lawyers from switching sides in the same case applies only where the complaining party sought *in good faith* to retain the lawyer.” *Id.*

EXAMPLE:

In a small town with a limited number of good family lawyers, where a divorce is brewing, one spouse has been known to consult with all of the best divorce lawyers in town, thus, hoping to disqualify them from representing the other spouse. This individual is engaged in the impermissible practice of taint shopping.

Corporations hold the privilege of confidentiality between corporate agents and the corporation’s attorney. *Rule 1.13 annot.* (2015) (under the heading “Confidentiality Issues between Organization and Constituents”). Thus, when corporations are charged with wrongdoing, they may escape a criminal indictment provided they cooperate with the prosecutor. Cooperation often includes waiving the attorney-client privilege so that the prosecutor can more easily pursue the corporate individuals involved in the criminal conduct.

When attorney-client conversations fall into any of the foregoing exceptions, testimony as to attorney-client communications can be elicited or compelled.

3. Privilege for an Organization

In a situation where an individual client is seeking the advice of a lawyer, it is easy to identify the privilege of confidentiality between the two. A corporation, on the other hand, is an artificial entity composed of many individuals with various levels of responsibility. The U.S. Supreme Court has held that the scope of the corporation’s attorney-client privilege is broad, extending to even lower-level corporate employees who consult with corporate counsel on corporate matters. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Information imparted by corporate personnel may be revealed by the attorney to other corporate employees who have a “need to know” such information (e.g., a corporate board of directors).

Rule 1.13 provides that when an attorney is employed by an organization such as a labor union, partnership, sole proprietorship, joint venture, corporation, estate, or other organization, the lawyer, acting through the organization’s officers, directors, agents, or employees, represents the organization and not the organization’s individual members. *Rule 1.13 annot.* (2015) (under the

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heading “*Subsection (a): Organization Is Client*”). The reader should think of the corporation as the principal and the officers and board of directors as agents who have hired the lawyer for the benefit of the principal. A lawyer for a corporation represents the corporation, not its employees or its shareholders. *Murray v. Metropolitan Life Ins. Co.*, 583 F.3d 173 (2d Cir. 2009); *Evans v. Artek Systems Corp.*, 715 F.2d 788, 792 (2d Cir. 1983). However, conversations between those employees and the entity’s lawyer are protected from disclosure if the discussions were germane to the legal interests of the corporation.

As noted above, when conversations between corporate individuals and corporate counsel on behalf of the organization occur, the privilege is for the organization to waive or assert. The individuals participating in the conversation cannot personally assert the attorney-client privilege. An exception arises where corporate counsel neglects to advise the corporate employee or agent that the conversation can be disclosed under circumstances where it is apparent that the employee’s interests are adverse to the corporation’s, or where the attorney manifests an intent to represent the corporate employee, in which event the attorney must not disclose the employee’s communication. *Rule 1.13*. When the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the organization’s constituents (e.g., employees, officers, shareholders, etc.) with whom the lawyer is dealing, Rule 1.13(f) places an affirmative obligation on the lawyer to explain the identity of the client to such constituents.

When an in-house lawyer or a lawyer representing an organizational client knows that a corporation’s agent is undertaking action in violation of the law or in violation of its duty to the corporation, the lawyer has a duty proceed as is “reasonably necessary in the best interest of the organization.” *Rule 1.13(b)*. Generally, this means that the attorney should first counsel that agent to reconsider such conduct or to obtain separate legal counsel. If that fails, the in-house lawyer must “climb the corporate ladder” and take the matter to a higher authority in the corporate organization (unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so). *Id.* Once the highest authority has been consulted and refuses to act, despite that the action or inaction is “clearly [in] violation of [the] law” and likely to result in substantial injury to the organization, then the lawyer may go outside the organization to report it, “but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.” *Rule 1.13(c)*.

Ordinarily, when a confidential communication is disclosed to a third person, the privilege is lost. However, where the client is an organization, the privilege will protect confidential communications disclosed to other agents of the organization (e.g., corporate officers, directors or partners) who have a “need-to-know” of matters germane to the organization in order to act for the organization in that matter. *Rule 1.13 cmt. 2; Restatement (Third) of the Law Governing Lawyers § 73(4)(b) (2000)*.

When a lawyer represents an organization such as a professional or trade association, the lawyer is not prohibited from representing another client who intends to sue an individual member of the association. For example, if a lawyer represented a retailers’ trade association, the lawyer would not be prohibited from representing an injured plaintiff who slipped and fell in a hardware store owned by a member of the retailers’ trade association. The A.B.A. Ethics Committee concluded that as long as the lawyer had not represented the individual member or otherwise stood in a lawyer-client relationship with that member, the lawyer would not be barred from representing another client in a suit against a member of the trade association. The lawyer’s client is the

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association and not the individual members. To determine who the client is, look for who is paying the legal bills (usually, it's the entity). *A.B.A. Formal Op. 92-365 (1992)*.

Also, an attorney who represents a large national or international conglomerate corporation as a client is not ethically prohibited from representing other clients, on *unrelated matters*, whose interests are adverse to affiliates and subsidiaries of the large corporate client. *Rule 1.7; A.B.A. Formal Op. 95-390 (1995)*. In its opinion, the A.B.A. reasoned that neither the affiliate nor the subsidiary was the lawyer's client.

EXAMPLE:

Even though an attorney represents a corporation, the attorney, ethically, may represent an individual in her personal injury claim against a subsidiary of the corporation.

EXAMPLE:

A lawyer who represents a member of a commercial partnership does not necessarily represent the individual partners in that partnership. *A.B.A. Formal Op. 91-361 (1991)* (“Whether a lawyer representing a partnership has an attorney-client relationship with any individual partner depends on the facts of the particular situation . . .”).

If an attorney is retained by the fiduciary of a trust or an estate, the client is the trustee or executor (the fiduciary), not the individual beneficiaries of the estate or the trust. Thus, the lawyer has no ethical duty to protect the interests of a beneficiary. *A.B.A. Formal Op. 94-380 (1994)*. In addition, the lawyer cannot reveal confidences to the estate beneficiaries or trust beneficiaries relating to the representation unless the client (the executor or trustee) consents. *Rule 1.6(a)*.

B. CONFIDENTIAL CLIENT INFORMATION

1. Generally

The Rules prohibit an attorney from disclosing not just confidential conversations protected by the attorney-client privilege, but any information relating to the representation, without regard to the source of the information or when it was acquired by the attorney. *Rule 1.6(a)*. Thus, the lawyer's ethical duty of confidentiality applies even where the attorney-client privilege and the work product doctrine do not. *Lawrence J. Fox & Susan R. Martyn, Red Flags: A Lawyer's Handbook on Legal Ethics* § 5:03 (c) at 92-93 (2005).

Model Rule 1.6 applies to “information relating to the representation of a client,” and thus, is significantly broader than the attorney-client privilege because it “applies not only to matters communicated in confidence [to the attorney] by the client, which would likely be protected by the attorney-client privilege, “but also to all information relating to the relationship whatever its source.” *Rule 1.6(b)(1) cmt. 3 (2014)*.

The privilege protecting confidential client information obtained by an attorney is broader than the attorney-client privilege. *See Rule 1.6 cmt. 3*. It encompasses a broader scope of information obtained by an attorney, and it derives from agency law and the fiduciary relationship of an agent to

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a principal, as well as from the law of evidence. *Rule 1.6 annot. (2015) (under the heading “Nature and Origin of Duty of Confidentiality”).* An attorney should hold strictly confidential all information relating to the client’s representation, whether obtained before or after the attorney-client relationship exists. *See Rule 1.6(a).* This ethical obligation arises without regard to the nature or source of the information or the fact that others share the knowledge. *Id.; Rule 1.6 annot. (2015) (under the heading “Previously Disclosed or Publicly Available Information”).* However, unless the client directs otherwise, a lawyer may disclose a client’s affairs and other confidential information to partners or associates in the lawyer’s law firm. *Rule 1.6 cmt. 5.*

Likewise, the lawyer cannot *use* confidential information (e.g., to advance the lawyer’s own interests or the interests of another) if it would be to the disadvantage of (i.e., would harm) a current client. The lawyer must also take reasonable, affirmative steps to ensure that the client’s confidential information is safeguarded and that office personnel and paralegals do not disclose or misuse client information. *Rule 5.3.* However, if the confidential information of a *former* client has become “generally known” (i.e., the information is now in the public domain), the attorney may use the information, even to the former client’s disadvantage. *Rule 1.9 cmt. 8.*

EXAMPLE:

“[I]f a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. [However, t]he Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency’s interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients.” *Rule 1.8 cmt. 5.*

Lawyers must “act competently to safeguard information relating to the representation of a client” and take “reasonable precautions” to prevent confidential client material from falling into the hands of unintended recipients. *Rule 1.6 cmts. 16 and 17.* The obligation to preserve confidential client information extends beyond the termination of a lawyer’s employment. *See Rule 1.9 cmt. 1.*

2. Inadvertent Disclosure

What is an attorney’s ethical duty upon receiving an errant letter, fax, or email from opposing counsel, containing confidential information involving opposing counsel’s client, which the attorney knows or should know was inadvertently sent? The attorney’s ethical duty under such circumstances is to promptly notify opposing counsel in order to permit opposing counsel to take protective measures. *Rule 4.4(b); A.B.A. Formal Op. 05-437 (2005).*

On December 1, 2006, the Federal Rules of Civil Procedure were amended to add Rule 26(b)(5)(B), which applies to inadvertent disclosure during pretrial discovery. Whereas Rule 4.4(b) places the burden on the receiving party to raise the issue of inadvertent disclosure of privileged material, Rule 26(b)(5)(B) places the burden on the party who inadvertently disclosed the privileged material to notify the receiver thereof. Upon such notice, that party “must promptly return, sequester, or destroy the specific information and any copies it has” and “must not use or disclose the information until the claim is resolved.” *Id.* Note that this federal rule is limited to communications made during pretrial discovery and does not apply to other day to day communications (e.g., e-mail).

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On September 18, 2008, Federal Rule of Evidence 502 went into effect to prevent waiver of the attorney-client privilege and work product privilege if the disclosing attorney took reasonable steps to prevent mistaken disclosure and to timely rectify the error. It was hoped that this rule would reduce the tremendous cost of document review that takes place prior to turning over documents to an opposing party. *Valentin v. Bank of New York Mellon Corp.*, 2011 U.S. Dist. LEXIS 40711 (S.D.N.Y. Apr. 14, 2011).

The lawyer's duty to refrain from revealing confidential information "imposes a duty on a lawyer to take reasonable steps [under] the circumstances to protect such information against unauthorized use or disclosure." *A.B.A. Formal Op. 99-413* (1999). Two decades ago, most lawyer-client communication occurred either face-to-face, by telephone or by mail. Today, it can occur via facsimile, cell phone, or e-mail, which has significantly changed the landscape with respect to how a lawyer must act competently to preserve confidentiality. *See Rule 1.6 annot. (2015) (under the heading "Electronic Communications")*.

Today, "reasonable steps" are simply reasonable precautions to prevent confidential information from coming into the hands of unintended recipients. *Rule 1.6 cmt. 17*. Clearly, when considering what precautions to take, the lawyer should consider the sensitivity of the material being communicated and should advise the client of possible disclosure and misuse of the material. *Id.* In that regard, "'when the lawyer reasonably believes that confidential client information being transmitted is so highly sensitive that extraordinary measures to protect the transmission are warranted[.]" then a heightened level of care and discretion is warranted. *John D. Comerford, Competent Computing: A Lawyer's Ethical Duty to Safeguard the Confidentiality and Integrity of Client Information Stored on Computers and Computer Networks*, 19 *Geo. J. Legal Ethics* 629, 635 (2006) (quoting *A.B.A. Formal Op. 99-413* (1999)).

If the method of communication affords a "reasonable expectation of privacy," then the lawyer's ethical duty is satisfied. Thus, in most cases, the use of unencrypted emails satisfies the lawyer's duty and such use, if intercepted, does not waive the attorney-client privilege. *Ronald D. Rotunda § 1.6-2(c) at 255* (2015-2016 ed.). New York, on the other hand, requires the lawyer to "clean" the metadata from the electronic file. *N.Y.S.B.A. Ethics Op. 782* (2004); *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350 (S.D.N.Y. 2008).

Metadata is simply data contained within a document which tracks the history of an electronic document. Since lawyers have an ethical duty to take "reasonable precautions" to protect confidential information, when producing electronic documents, reasonable measures must be undertaken to preserve confidentiality (e.g., "scrubbing" the file) if the documents contain sensitive information. Under this ABA approach, the lawyer's duty to maintain client confidentiality requires the lawyer to eliminate metadata by "scrubbing" or converting the document into another format (e.g., PDF format) before sending it. Accordingly, when lawyers receive electronic documents (e.g., in furtherance of contract negotiations or settlement negotiations) they have no ethical duty under Rule 4.4 to refrain from reviewing and using metadata embedded therein (e.g., using metadata to determine when the document was created, who created and accessed it, and prior edits). *A.B.A. Formal Op. 06-442* (2006). Thus, receiving a document containing metadata does not, standing alone, give rise to a presumption that the disclosure of such information was inadvertent. Rule 4.4(b) requires the receiving lawyer to notify the sender of the receipt of metadata only if the receiving lawyer "knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer." *Rule 4.4(b) cmt. [2]*.

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However, if the hard drive or computer files are damaged in pretrial discovery, scrubbing the file to delete metadata would subject the lawyer or client to sanctions and/or criminal charges of obstruction of justice. *Id.*

Some clients may insist on a more secure form which requires the lawyer to follow the client's instruction (encrypted e-mail). *Rule 1.6 cmt. 17.* Also, if the information contains unusually sensitive or top-secret information, such client instruction may warrant that the lawyer refrain from using a cell phone, email, or fax to transmit confidential information. Thus, special circumstances may require "special precautions" rather than "reasonable precautions." *Id.* Note that clients may provide informed consent to permit a lawyer to use a method of communication that otherwise would violate. *Id.*

3. Prospective Clients, (See *infra* Chapter IV: F. 3: Conflict of Interest)

4. Client Files

Every law student knows that lawyers have a general duty to maintain client confidences and secrets, but not all are aware that this duty extends beyond the obvious.

- Lawyers are "well advised" to arrange with a computer maintenance company to provide for a confidentiality agreement on client files. *ABA Formal Op. 95-398 (1995).*
- Lawyers that outsource client matters to contract lawyers or nonlawyers are required to investigate those parties' own confidentiality safeguards – "perhaps even [their] recycling and refuse disposal procedures." *A.B.A. Formal Op. 08-451 (2008).*
- Lawyers are required to dispose of client files in a manner evidencing reasonable care to preserve client confidentiality. *See Disciplinary Counsel v. Shaver, 904 N.E.2d 883 (Ohio 2009) (in which a lawyer was reprimanded when he vacated his law office lease and left twenty boxes of client files next to a dumpster).*
- The A.B.A. Commission on Ethics 20/20 issued a paper on a lawyer's ethical obligation to take reasonable precautions to prevent hacking and to protect client confidentiality when using "cloud" computing, which is remote internet storage of confidential client files stored anywhere in the world on large internet servers, controlled by third parties. The 20/20 Commission equated cloud storage with outsourcing a client's matter. *A.B.A. Comm. on Ethics 20/20, For Comment: Issues Paper Concerning Client Confidentiality and Lawyers' Use of Technology (2010), http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/clientconfidentiality_issuespaper.authcheckdam.pdf; see also N.Y.S.B.A. Ethics Op. 842 (2010) (which is consistent with the A.B.A.'s view).*
- Rule 1.1 provides that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This includes the lawyer's internet technology knowledge or assistance to undertake measures to discourage cybersecurity attacks. Rule 1.6(c) provides that "[a] lawyer shall make *reasonable* efforts to prevent the inadvertent or unauthorized access to,

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information relating to the representation of a client. Here the guiding key is “reasonable.” A lawyer cannot guarantee that cyber-attacks will not occur.

5. Digital Age “Reasonable” Protections

- Adopting complex passwords;
- Training lawyers and staff on “phishing” and other invasive emails;
- Adopting encryption technologies;
- Updating antivirus software; and
- Prohibiting the use of personal devices for client data.

Lawyers have a duty to warn clients about e-mailing confidences and secrets on computers that are accessible by third parties (e.g., employers or family members). *A.B.A. Formal Op. 11-459 (2011)*. Frequently, employers’ policies allow employers free access to employees’ e-mail files, and, as such, the lawyer must warn the client of this risk. The lawyer’s duty to safeguard client confidentiality also includes refraining from e-mailing the client at the client’s place of employment.

Note that an employer’s attorney who reviews e-mails between a former employee and her attorney does not have to notify the employee’s attorney of this fact, unless the employer’s attorney is so required by court decision or other law in that jurisdiction. *A.B.A. Formal Op. 11-460 (2011)*. New Jersey, for example, requires the employer’s attorney to notify the employee’s attorney when downloading e-mails between the employee and her attorney, which the employer’s attorney intends to use in litigation. *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010). Likewise, in other jurisdictions where the employer’s lawyer is required by common law or court rule to disclose these e-mails to the employee’s lawyer, failure to do so not only subjects that lawyer to court sanctions, but also subjects that lawyer to discipline for violating Rule 3.4(c), which prohibits a lawyer from knowingly disobeying a court rule. *A.B.A. Formal Op. 11-460 (2011)*.

C. REVEALING CONFIDENTIAL INFORMATION

1. Generally

A lawyer may reveal confidential client information under limited circumstances. *Rule 1.6*. In that regard, a lawyer may reveal confidential information:

1. With the informed consent of the client (pursuant to Rule 1.6(a)).
2. To the extent reasonably necessary to comply with a court order or other law. *Rule 1.6(b)(6)*. If the attorney is subpoenaed to testify before the grand jury or at trial, the attorney’s obligation is to initially raise the attorney-client privilege. Once a court overrules the privilege, the attorney is not obligated to appeal the court’s ruling, but he is (generally) required to inform the client about the possibility of appeal so that the client can make an informed decision regarding the representation. *Rule 1.6 cmt. 13; ABA Formal Op. 473 (2016)*. If the client wishes to appeal, the client bears the expense of the lawyer’s time and other costs. While both the attorney and the client have standing to raise the privilege, third persons lack standing to raise the privilege or appeal an adverse ruling on the privilege.

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If the client is unavailable when the attorney receives a subpoena for the attorney to turn over documents or to testify, the lawyer should not passively produce the demanded information but should attempt to oppose or limit the subpoena on any legitimate available grounds (immunity, attorney-client privilege, relevance or overbreadth). However, once disclosure is ordered by a court, “[a] lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal.” *Rule 1.6 cmt. [15], and 3.4(a)*. Such an order does not have to be appealed by the lawyer on behalf of the unavailable client. *ABA Formal Op. 473 (2016)*.

EXAMPLE:

A father and mother were engaged in a bitter custody suit regarding their daughter. The mother lost the suit and kidnapped the daughter. The mother then retained a lawyer to represent her. During the lawyer’s discussions with the mother, the lawyer discovered the whereabouts of the daughter. The lawyer was ordered by the court to disclose the daughter’s whereabouts to the authorities because the welfare of a minor prevails over the interest in preserving lawyer confidentiality. *Matter of Jacqueline F., 47 N.Y.2d 215 (1979)*. Thus, disclosure was permitted “to comply with . . . a court order.” *Rule 1.6(a)(6)*.

3. To the extent reasonably necessary to secure legal advice about the lawyer’s compliance with these Rules. *Rule 1.6(b)(4)*.
4. To the extent reasonably necessary to prevent reasonably certain death or substantial personal injury. *Rule 1.6(b)(1)*.
5. To the extent reasonably necessary to prevent the client from committing a crime or civil fraud using the lawyer’s services (e.g., securities fraud) that would cause or has caused substantial financial harm to, or harm to the property of, others, or to mitigate or rectify such harm. *Rule 1.6(b)(2) and (3)*.
6. To the extent reasonably necessary to establish or collect a legal fee, or to establish a defense against an accusation of wrongful conduct against the lawyer or the lawyer’s agent, asserted either by the client in a legal malpractice claim, or by a third person in a claim or threatened claim of wrongdoing against the lawyer. *Rule 1.6(b)(5)*. Frequently, this is referred to as “self-defense” disclosure by an attorney.
7. To the extent reasonably necessary to protect a client, where the client’s diminished mental capacity has placed the client at risk of a substantial financial, physical, or other harm. *Rule 1.14(b)*. The lawyer is impliedly authorized under Rule 1.6(a) to reveal confidential information about the client, but only to the extent reasonably necessary to protect the client’s interest. *Rule 1.14(c)*. The lawyer does not necessarily have to seek the appointment of a guardian; rather, the lawyer may undertake less intrusive measures such as consulting with the client’s psychiatrist, family members, or support group, or using a durable power of attorney. *Rule 1.14 cmt. 5*.
8. To the extent reasonably necessary to carry out the representation, except to the extent that the client’s instructions or special circumstances limit this authority (e.g., limiting

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disclosure to other attorneys in the same firm or to an expert retained by the attorney to assist in the representation). *Rule 1.6 cmt. 5.*

EXAMPLE:

Just prior to trial, an attorney interviewed a character witness, who intended to testify about the attorney's client's good character trait in the community for peacefulness. Knowing that the witness would be cross-examined by the District Attorney with respect to the client's prior convictions and specific instances involving the client's prior violent behavior, the attorney properly disclosed otherwise confidential information about the client's violent behavior, since the attorney reasonably believed that doing so would advance the best interests of the client (i.e., would soften the blow or "pull the teeth" of the prior convictions by explaining them on direct). This is permissible conduct, pursuant to Rule 1.6(a).

The following disclosures are "impliedly" authorized:

- Disclosures by a lawyer hired by a liability insurance company to defend an insured, to share with the insurance company information that will advance the interests of the insured. *A.B.A. Formal Op. 01-421 (2001).*
- Disclosure to opposing counsel of inadvertently omitted contract clauses. *A.B.A. Informal Op. 86-1581 (1986).*
- Disclosures that advance a client's interests. *Restatement (Third) of the Law Governing Lawyers § 61 (2000); see Rule 1.6 cmt. 5.* This would appear to allow the lawyer to seek legal advice from a lawyer outside the law firm, couched in hypothetical generalities, so as not to reveal confidential information. *See Rule 1.6 cmt. 4; Oregon State Bar Legal Ethics Comm. Op. 2011-184 (2011).*

2. To Prevent Death or Substantial Bodily Harm

In *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425 (1976), a mental health professional was found to owe a duty to breach his professional code of silence and inform someone who is specifically threatened by the professional's patient.

A lawyer may, but need not, disclose confidential information to prevent reasonably certain death or substantial bodily harm, even if the harm is not imminent (e.g., the lawyer may disclose a client's intent to commit suicide, , the client's knowingly sale of unsafe products that may cause serious injury in the future, or the client's accidental discharge of toxic waste into the town's water supply which could cause a debilitating disease). *Rule 1.6 cmt. 6.* Pursuant to Rule 1.6(b)(1), an attorney may disclose a client's confession to a crime for which someone else is about to be executed.

In Florida, Connecticut, Arizona, Vermont, Illinois, and New Jersey, the state ethics rules impose a mandatory (not permissive) reporting obligation on lawyers with respect to such matters. They compel disclosure by a lawyer to prevent a client from committing a "criminal, illegal, or fraudulent act that the lawyer reasonably believes is likely to result in death, substantial bodily harm or substantial injury to the financial interest or property of another." New York, and the vast

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majority of states on the other hand, follows Rule 1.6, and permits discretionary (not mandatory) disclosure where the client manifests an intent to commit any crime or fraudulent act likely to result in serious physical harm or substantial harm to property. A lawyer's failure to disclose, resulting in personal or economic injury probably will not result in civil liability to the non-disclosing lawyer, since the state made non-disclosure discretionary.

3. Fraud

a. Generally

Inherent in the representation of clients is the conflict between the duty owed to society and that owed to the client. The client shall be represented zealously, but the attorney cannot assist the client in accomplishing illegal goals, perjury, or ongoing illegal activity. *Rule 1.6 cmt. 7*. A lawyer cannot ever encourage or aid the client in committing criminal acts or counsel the client on how to violate the law and avoid punishment therefore.

If and when the attorney becomes aware of a client's ongoing or anticipated illegal or fraudulent conduct, the attorney must, where practicable, counsel the client to correct the wrongdoing. *Rule 1.6 cmt. 14*. "A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." *Clark v. United States*, 289 U.S. 1, 15 (1933); *see also Rule 1.6 cmt. 7*. If the lawyer's services have been or will be used by the client in materially furthering a course of illegal or fraudulent conduct, the lawyer ordinarily must withdraw (pursuant to Rule 1.16), and the lawyer may reveal this information to a third party to prevent, mitigate, or rectify substantial injury to the financial interests or property of another (pursuant to Rule 1.6(b)). *See also Rule 1.16 cmt. 2*. If the attorney knows that his client has committed fraud or perjury on the court, the attorney is required to take reasonable remedial measures, which generally include encouraging the client to come clean, and, if the client refuses, seeking to withdraw (which may require the lawyer to advise the court of the client's fraud). *Rule 3.3(a)(3)*; *Rule 3.3 cmt. 10*.

EXAMPLE:

An attorney was consulted by a client who, while employed abroad, received substantial sums of cash from a source other than the client's employer. The client had not disclosed these payments to his employer or declared them as income on his tax return. The client now wants to know how to bring these funds into the United States without detection and without reporting them to the I.R.S.. The attorney suspects that the payments were unlawful bribes or kickbacks. What should the attorney do?

A lawyer must not knowingly participate in a transaction to effectuate a criminal or fraudulent evasion of tax liability. *Rule 1.2 cmt. 12*. Counseling or assisting a client in conduct that the lawyer knows to be illegal or fraudulent violates Rule 1.2(d). Although a lawyer may discuss with the client the probable legal consequences of the client's proposed actions, the lawyer may not counsel his client on how to violate the law and escape punishment therefrom. *Rule 1.2 cmt. 9*. "A lawyer cannot escape responsibility by avoiding [further client] inquiry [but rather has] a duty to inquire further. *See A.B.A. Formal Op. 335 (1974)*. [This duty] may also arise separately under [Rule 1.1], which requires a lawyer to be adequately prepared and thus

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adequately informed to represent a client competently.” *A.B.A. Informal Op. 1470 (1981)*.

Rule 1.2(d), which applies to representation in general, expressly provides, “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

EXAMPLE:

An attorney handled the sale of a client’s real estate. After the sale, the client retained the attorney to assist the client in filing for bankruptcy. The attorney advised the client that the proceeds from the sale of the real estate must be listed as an asset on the bankruptcy petition, since the transaction occurred within one year of filing the bankruptcy petition. The client fired the attorney, retained a different attorney to handle the bankruptcy petition, and did not disclose to that attorney the real estate sale or the proceeds.

If the client’s fraud on creditors subsequently becomes an issue, both attorneys may properly be called to testify, because the client retained the services of both lawyers for the purpose of perpetrating a fraud. The attorney-client privilege does not apply to such communications. *Restatement (Third) of the Law Governing Lawyers § 82 cmt. c, illus. 2 (2000)*.

EXAMPLE:

An attorney was retained to provide legal advice to members of a drug cartel during its ongoing criminal activity, and to appear at arraignments of any arrested co-conspirators. The attorney-client privilege does not apply to this crime-fraud situation, and, thus, the attorney may be subpoenaed to testify as to conversations with the co-conspirator gang members. *United States v. Hodge and Zweig, 548 F.2d 1347, 1354-55 (9th Cir. 1977)*; see also *David Orentlicher, Fee Payments to Criminal Defense Lawyers From Third Parties: Revisiting United States v. Hodge and Zweig, 69 Fordham L. Rev. 1083 (2000)*.

EXAMPLE:

A merchant retained an attorney for tax advice and to prepare the merchant’s tax return. The merchant admitted to receiving substantial amounts of cash that the merchant refused to declare on his income tax return. This crime/fraud on the I.R.S. prevented the attorney from successfully invoking the attorney-client privilege on the merchant’s behalf. *In re Witness Before the Grand Jury, 631 F. Supp. 32 (E.D. Wis. 1985)*.

b. Fraud on a Tribunal

A tribunal is defined in the Rules to include:

1. a court;
2. an arbitrator in binding arbitration; or
3. a legislative or administrative body acting in an adjudicative capacity. *Rule 1.0(m)*.

A lawyer:

1. **must** refuse to offer evidence to a tribunal the lawyer **knows** is false, regardless of the client's wishes. *Rule 3.3(a)(3)*.
2. **may** refuse to offer evidence (real or testimonial), other than the testimony of a defendant in a criminal matter, that the lawyer **reasonably believes** is false, regardless of the client's wishes. *Rule 3.3(a)(3)*. This rule also applies to ancillary proceedings, such as pretrial depositions. *Rule 3.3 cmt. 1*.
3. **must** take reasonable remedial steps to remedy false or misleading evidence submitted to a tribunal (real evidence, such as falsified documents, or perjured testimony) that the lawyer knows is false. *Rule 3.3(a)(3)*. Remedial steps may include necessary disclosure to the tribunal, even if it requires disclosure of information otherwise protected by Rule 1.6. *Rule 3.3(c); N.Y.S.B.A. Ethics Op. 837 (2010)*.
4. **must** take reasonable remedial steps, which may include disclosure of confidential communications, whenever a person, including the lawyer's client, involved in an adjudicatory proceeding intends to or actually engages in criminal or fraudulent conduct (e.g., threatens or bribes a witness or juror, unlawfully conceals or destroys evidence or documents, etc.). *Rule 3.3(b)*.
5. **must**, in an ex parte adjudicative proceeding (e.g., when seeking an order to show cause, making a motion for a provisional remedy, such as a temporary restraining order, or making an application for a default judgment), inform the tribunal of all material facts that will enable the tribunal to make an informed decision, regardless of whether the facts are adverse to the lawyer's client. *Rule 3.3(d)*. "This rule imposes a seemingly incredible obligation on an attorney in ex parte proceedings. It requires the lawyer to act predominantly not as an advocate for the client, but as an officer of the court." *Jill M. Dennis, The Model Rules and the Search for Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 *Geo. J. Legal Ethics* 157 (1994).
6. **must** disclose adverse legal authority controlling in that jurisdiction known to the lawyer to be directly adverse to the lawyer's client's position and not brought to the attention of the tribunal by opposing counsel. *Rule 3.3(a)(2); Hendrix v. Page*, 986 *F.2d* 195 (7th Cir. 1993).

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7. **must** not make a false or misleading statement of fact or law to a tribunal, or fail to correct such a statement. *Rule 3.3(a)(1)*. In other words, if a false statement is made to the tribunal, the lawyer has a continuing duty to correct it. The lawyer's disclosure duties under Rule 3.3 continue to the conclusion of the proceeding (i.e., until the final judgment in the proceeding has been affirmed on appeal or the time to take such an appeal has expired).

When a lawyer receives information clearly establishing that a client or third person (a witness) has perpetrated a fraud upon a tribunal, the lawyer shall promptly take reasonable remedial measures, which may include revealing the fraud to the tribunal. A lawyer has a mandatory duty to report a client's fraud on the court where necessary, even though such information would be categorized as confidential information. *Rule 3.3(a)(3)*. A lawyer's disclosure of the client's confidences is mandatory to prevent the perpetration of fraud on a tribunal, or to remedy the lawyer's unintentional use of false evidence. *Rule 3.3(a)(1) and (3)*. This duty of disclosure continues to the conclusion of the proceedings. *Rule 3.3(c)*.

EXAMPLE:

An attorney's client was arrested for the third time for driving while intoxicated. To avoid a felony conviction, and to obtain a more favorable plea bargain, the client assumed a false identity by using her mother-in-law's driver's license.

During the representation, when the attorney learns that the client is proceeding under a false identity, he cannot initially reveal the client's past act because this information is subject to the attorney-client privilege. However, the attorney cannot take part in any activity that would perpetrate a fraud on the court and must take reasonable remedial measures to correct any fraud on the court of which the attorney knows. If the attorney is unable to dissuade the client from lying, the attorney must seek permission from the court to withdraw from the case citing "irreconcilable conflict." If this motion is denied (which it usually is) and the attorney is ordered to continue, then the attorney-client privilege no longer bars the lawyer from disclosing the client's true identity to the court. Attorney-client communications which reveal ongoing criminal conduct are not privileged. *People v. Casey, 948 P.2d 1014 (Colo. 1997); People v. DePallo, 96 N.Y.2d 437 (2001)*. Note that "[i]f withdrawal from the representation is not permitted [by the court] or will not undo the effect of the false evidence, the [lawyer] must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal [confidential] information" *Rule 3.3 cmt. 10*. Note that under the above facts, simply withdrawing from the legal representation would not have remedied the fraud, so withdrawal would not be a viable option for the attorney seeking to comport with the Rules. "It is for the [judge] then to determine what should be done – making a statement about the matter to the [jury], ordering a mistrial or perhaps nothing." *Id.*

Rule 4.1(b) mandates disclosure to third parties "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6" because it is confidential. As discussed above, Rule 1.6(b)(2) allows the attorney to disclose, at the attorney's discretion (i.e., the attorney "may" disclose), what otherwise would be considered a confidence or secret, to the extent the lawyer reasonably believes necessary "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the

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financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." Also, the lawyer "may" disclose confidential information, to the extent the lawyer reasonably believes necessary, to prevent the client from committing a criminal act likely to result in reasonably certain death or substantial bodily harm. *Rule 1.6(b)(1); see also Restatement (Third) of the Law Governing Lawyers § 66 (2000).* .

c. Fraud on Third Parties

If the client is using the lawyer's services to commit a crime or fraud that would cause substantial financial harm to others, then, under revised Rules 1.6(b)(2) and (3), the lawyer may disclose the confidential information to prevent, mitigate, or rectify the consequences of the fraud. The lawyer also may withdraw so that the lawyer is not aiding the client in fraudulent conduct. *Rule 1.16(b)(2); see also Rule 1.16 cmt. 7 ("Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it.")*.

Remember that for Rules 1.6(b)(2) and (3) to apply (and to allow information relating to the representation to be revealed), the client's crime or fraud must have been facilitated by the client's use of the lawyer's services. These "prevent," "mitigate," or "rectify" disclosure exceptions to Rule 1.6(a) presume that a client has, either by misrepresentation or concealment, tricked the lawyer into being an unwitting participant (an aider or abettor) in the client's crime or fraud. In other words, to recap, Rules 1.6(b)(2) and (3) apply only when:

1. the client uses the lawyer's services to commit a crime or fraud; and
2. the crime or fraud is reasonably certain to result in substantial financial injury to another.

QUERY:

An attorney represented a leasing company. The leasing company borrowed \$200 million from banks using phony computer leases as collateral. Unaware of the fraud, the attorney issued an opinion letter supporting his client's loan application. Six months later, the attorney learned that the leasing company had submitted false financial information. The officers of the leasing company now propose to continue dealing with the banks, using a new law firm that would not be told about the fraud. What is the attorney's ethical obligation?

ANSWER:

A lawyer who learns that his or her legal services are being used to perpetuate a fraud on another person may withdraw from representing the client in that matter (pursuant to Rule 1.16(b)(2)) so as to avoid counseling or assisting the client in committing the ongoing fraud. *See also Rule 1.2(d)*. The lawyer may, but is not required to, disclose information necessary to prevent, mitigate, or rectify substantial economic harm to others from a client's use of the lawyer's services in furtherance of a crime or fraud. *Rule 1.6(b)(2) and (3)*. This 2003 rule change resulted from criticism of lawyers who silently witnessed the WorldCom, Enron, and other corporate scandals in the securities market. Under the federal Sarbanes-Oxley Act, corporate accountants and lawyers involved in issuing stock offerings must report up the corporate ladder, to the

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chief legal officer (“C.L.O.”) or the board of directors, evidence of material breaches of securities laws or fiduciary duties. Rule 1.13(c) now permits, but does not require, disclosure outside the corporation to the extent the lawyer believes reasonably necessary to prevent substantial harm to the organization where the highest corporate authority refuses to abate a clear violation of the law.

The A.B.A. has also concluded that lawyers have a whistleblowing duty to withdraw from representing clients who use the lawyer’s services in furtherance of a fraud, and now, such a lawyer is permitted to make a “noisy withdrawal” by disaffirming the lawyer’s prior work product to rectify a client’s ongoing fraud, even if the “noisy withdrawal” would inferentially reveal client confidences. This is to prevent the lawyer’s work product from being used in furtherance of the client’s ongoing or intended fraud. The disclosure is permitted when the client is determined to continue the fraudulent conduct, which the lawyer has unwittingly facilitated, or to make use of the lawyer’s services or work product in a future fraud, and there is no other way for the lawyer to avoid aiding such continuing or future fraud. *A.B.A. Formal Op. 92-366 (1992)*. Note that if the fraud has ceased, the lawyer is not permitted to make a “noisy withdrawal,” but may withdraw from the representation. *Id.*

Rule 1.2(d) simply provides that a lawyer shall not assist a client in conduct the lawyer knows is criminal or fraudulent. Rule 1.4(a)(5) requires a lawyer to consult with the client regarding any relevant limitations on the lawyer’s conduct if the lawyer knows the client expects assistance not permitted by law or the Rules. Read together, these Rules require the lawyer to avoid aiding or abetting a client in committing a criminal or fraudulent act, and require the lawyer to advise the client of those constraints, including the limitations on the duty of confidentiality under Rule 1.6.

Rule 4.1(a) and (b) (governing truthfulness in statements to others) requires that where a lawyer discovers that the client has deceived the lawyer, and, as a result, the lawyer has inadvertently either told others inaccurate information or failed to disclose an accurate material fact where necessary to avoid assisting in the crime or fraud, the lawyer must take measures to correct the deception. *See also Rule 4.1 cmt. 3*. Where such deception was accomplished through the attorney’s services and is reasonably certain to result or has already resulted in substantial injury to the financial interests or property of others, disclosure is no longer prohibited, pursuant to revised Rule 1.6(b). It appears that the lawyer now has a mandatory obligation under Rule 4.1 to disclose a material fact to a third person if it is necessary to prevent the lawyer from assisting the client in criminal or fraudulent acts.

d. Perjury

An attorney who knowingly presents perjured testimony is committing a fraud on a tribunal. *Rule 3.3(a)(3)*. The attorney’s dilemma when a client commits or intends to commit perjury arises from the attorney’s duty to preserve the confidential information of the client.

If, prior to the conclusion of the proceedings, a lawyer learns that the client has given testimony the lawyer knows is false, and the lawyer cannot persuade the client to rectify the perjury, the lawyer must disclose the client’s perjury to the tribunal to the extent reasonably necessary to remedy the fraud, notwithstanding the fact that the information to be disclosed is otherwise confidential information relating to the representation. *Rule 3.3 cmt. 10*.

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EXAMPLE:

An attorney learned prior to trial that his client falsified documents and committed perjury during the pretrial discovery proceedings.

First, the attorney must call upon the client to remedy the fraud. If the client refuses and withdrawal would not undo the fraud, the attorney must take whatever steps are necessary to remedy the fraud (e.g., disclose it to the court and opposing counsel). *Rule 3.3 cmt. 10; A.B.A. Formal Op. 93-376 (1993).*

“[I]f the lawyer knows from the client’s clearly stated intention that the client will testify falsely, and the lawyer cannot effectively withdraw from the representation, the lawyer must either limit the examination of the client to subjects on which the lawyer believes the client will testify truthfully; or, if there are none, not permit the client to testify; or, if this is not feasible, disclose the client’s intention to testify falsely to the tribunal.” *A.B.A. Formal Op. 353 (1987); Rule 3.3 cmt. 6.*

EXAMPLE:

A lawyer in a criminal case warned his client that, if the client committed perjury, the lawyer would withdraw from the case, tell the judge, and testify against the client. As a result, the client did not commit perjury and the jury convicted the client. On appeal, the client argued that the lawyer’s warning made him change his testimony and ultimately denied him his Sixth Amendment right to the effective assistance of counsel. The U.S. Supreme Court held that the lawyer’s conduct fell within the wide range of acceptable professional responses to threatened client perjury under the Sixth Amendment. *Nix v. Whiteside*, 475 U.S. 157 (1986); *People v. DePallo*, 96 N.Y.2d 437 (2001). “[The Model Rules of Professional Conduct] confirm that the legal profession has accepted that an attorney’s ethical duty to advance the interests of [the] client is limited by an equally solemn duty to comply with the law and standards of professional conduct” *Nix*, 475 U.S. at 168.

Before an attorney can notify the court of the client’s intent to commit perjury, the attorney must have a “firm factual basis for the belief,” based upon a “clear expression of intent to commit perjury.” *United States v. Long*, 857 F.2d 436, 444-45 (8th Cir. 1988). If the lawyer reasonably believes that evidence is false, the lawyer may refuse to offer it, unless the evidence is the testimony of a defendant in a criminal matter. *Rule 3.3(a)(3); Rule 3.3 cmt. 9.* However, if the lawyer knows evidence is false, the lawyer shall not offer it. *Id.* Once evidence is offered, the lawyer is not required to take remedial measures unless the lawyer knows (not reasonably believes) that the evidence is false. *Id.*

4. Non-Confidential Client Documents

If a document is not privileged, a client cannot make it privileged merely by handing it to a lawyer. *Gould Inc. v. Mitsui Mining & Smelting Co., Ltd.*, 825 F.2d 676, 679-80 (2d Cir. 1987). For example, in *Fisher v. United States*, 425 U.S. 391 (1976), the work product of the taxpayer’s accountant in the hands of the taxpayer’s attorney was not protected by the Fifth Amendment. If the documents would have been privileged in the client’s hands, however, the client should not be penalized for seeking legal advice and sharing the documents with an attorney. *See, supra, this Chapter at A.1 (providing examples).*

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If, however, the document is privileged (e.g., pursuant to the doctor-patient or attorney work product privilege), but it is inadvertently disclosed to an adverse party or an adverse party's lawyer (e.g., via a misdirected fax), then the receiving lawyer has an ethical duty to immediately notify the adversary that the document was inadvertently disclosed. *Rule 4.4(b)*; *A.B.A. Formal Ops. 92-368 (1992) (discussing inadvertent disclosure by an opposing party)* and *94-382 (1994) (discussing disclosure by an unauthorized party)*; see also, *supra*, this Chapter at B.2.

5. Fee Payment Disclosure

The fee arrangement between attorney and client does not ordinarily constitute a confidential communication and, thus, is not privileged in the usual case. *United States v. Pape*, 144 F.2d 778, 782, cert. denied, 323 U.S. 752 (1944); see also *Matter of Michaelson*, 511 F.2d 882, 888 (9th Cir.), cert. denied, 421 U.S. 978 (1975). "A communication concerning the fee to be paid has no direct relevance to the legal advice to be given. It is a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment, is not privileged." *Matter of Priest v. Hennessey*, 51 N.Y.2d 62, 69 (1980).

"[N]o attorney-client relationship arises between the third party and the attorney on the mere payment of attorney fees on behalf of another. The name of the person retaining an attorney for another and the amount of the retainer paid are quite simply not the confidences which the privilege was intended to protect. Rather, the statements of the client for the purpose of seeking advice from his counsel were the disclosures which were to be kept secret" (internal citations and quotations omitted). *Id.* at 70. The Second Circuit has stated: "To impose additional requirements that the government show its need for the [fee] information sought and that the attorney is the only source for that [fee] information would hamper severely the investigative function of the grand jury" *In re Grand Jury Subpoena (Slotnick)*, 781 F.2d 238, 248 (2d Cir. 1985) (*en banc*), cert. denied, 475 U.S. 1108 (1986).

EXAMPLE:

An attorney, hired and paid by a third person to represent various women charged with prostitution, was compelled to appear before the grand jury. The attorney could be ordered to disclose the identity of the third person who paid the legal fee and the amounts paid for such prior representation. *Matter of Priest v. Hennessey*, 51 N.Y.2d 62 (1980); see also *In re Grand Jury Subpoenas (Hirsch)*, 803 F.2d 493 (9th Cir. 1986) (*holding similarly in the context of a multimillion dollar marijuana conspiracy*).

EXAMPLE:

A lawyer was compelled to reveal the identity of a third party who paid the legal fees of one of the attorney's clients. The court said the fee information simply was not a confidential communication. *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423 (5th Cir. 1991).

6. Identity of a Client

Only those communications made in confidence to an attorney for the purpose of seeking professional advice are afforded the status of privileged communications under the Rules of Evidence. Inasmuch as a client's identity generally is not relevant to the legal advice proffered by an attorney, the identity of a client is generally not privileged. *See generally R.M. Weddle, Disclosure of Name, Identity, Address, Occupation, or Business of Client as Violation of Attorney-Client Privilege, 16 A.L.R. 3d 1047 (1967).* Asking a lawyer for a client's name generally seeks no essential client communication. Disclosure of the client's identity is protected by the attorney-client privilege, however, if it would be inconsistent with the very purpose and intent of the client to reveal the client's identity (e.g., consulting an attorney in connection with the client's involvement in a hit and run accident). *D'Alessio v. Gilberg, 205 A.D.2d 8 (2d Dep't 1994).* In other words, the client's identity is not protected by the attorney-client privilege unless "the net effect of the disclosure would be to reveal the nature of a client communication." *1 Kenneth S. Broun et al., McCormick on Evidence § 90 (6th ed. 2006); Rule 1.6 annot. (2015).*

Some courts have held that defense counsel does not have to reveal the client's identity if the lawyer's testimony "may well be the link that could form the chain of testimony necessary to convict an individual of a federal crime." *Baird v. Koerner, 279 F.2d 623, 633 (9th Cir. 1960) (holding that where a client retains counsel to mail a check to the I.R.S. to avoid possible future tax fraud penalties, the lawyer may refuse to identify the client where this testimony would be the last piece in the prosecutor's puzzle).*

7. Fugitive Clients

May a lawyer represent a fugitive who refuses to surrender? Yes. The A.B.A. has withdrawn, as inconsistent with the Code and Rules, opinions requiring lawyers to disclose the whereabouts of a client who jumps bail or information concerning parole violations. *A.B.A. Formal Op. 84-349 (1984) (withdrawing Formal Ops. 155 and 156 (1936)).* Thus, lawyers may represent fugitive clients and are not ethically obligated to disclose information about their clients' whereabouts.

Likewise, a lawyer is not required to withdraw from representation of a fugitive when the fugitive refuses to follow the lawyer's advice to surrender. In fact, a lawyer may continue in the representation of the client, even though the client elects to pursue a course of conduct contrary to the advice of the lawyer, so long as the lawyer is not thereby knowingly assisting the client in engaging in illegal conduct. There is a distinction between giving legal advice and aiding a client in escaping justice. *See Rule 1.2(d); Rule 1.2 cmts. 9 and 10.* In that regard, a lawyer may never encourage or aid his client in committing criminal acts or counsel the client on how to violate the law and avoid punishment thereafter.

The Second Circuit has recognized the court's power to entertain a motion to dismiss an indictment when the motion is made by an attorney for a fugitive defendant. Otherwise, the lawyer would, potentially, be unable to negotiate on behalf of the client for the client's surrender. *United States v. Weinstein, 511 F.2d 622, 629 (2d Cir.), cert. denied, 422 U.S. 1042 (1975).*

8. Evidence of Past Crimes

The lawyer has no obligation to reveal confidential information about a client's prior crimes, the whereabouts of dead bodies, or the location of the weapons or fruits of the crime, but the lawyer cannot take possession of them. *See Rule 3.4(a)*.

QUERY:

An attorney took possession of stolen money and a sawed-off shotgun, knowing that the money had been stolen and that the gun had been used in an armed robbery. The attorney intended to retain the contraband pending his client's trial unless the government discovered it. By retaining this evidence, the attorney intended to destroy the chain of evidence that linked the contraband to the client and to prevent its use to establish the client's guilt. The attorney thought that because the contraband was in the attorney's possession, the attorney could claim a privilege and thus effectively exclude it from evidence. Was the attorney's conduct ethically correct?

ANSWER:

No, Rule 3.4(a) provides that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." The attorney was suspended from federal practice for 18 months. *In re Ryder*, 263 F. Supp. 360, *aff'd*, 381 F.2d 713 (4th Cir. 1967); *see also Note, Ethics, Law and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 Stan. L. Rev. 977 (1980).

QUERY:

A client told her attorney the whereabouts of a critical piece of evidence, a wallet, which was located behind the client's house. The attorney quickly sent his investigator to the client's house and eventually turned the wallet over to the police. May the prosecutor call the attorney's investigator to testify, or is the investigator's testimony a product of the attorney-client privilege?

ANSWER:

The court found the attorney's decision to remove evidence to be a tactical choice. "If defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation. If, however, counsel chooses to remove evidence to examine or test it, the original location and condition of that evidence loses the protection of the privilege. Applying this analysis to the present case, we hold that the trial court did not err in admitting the investigator's testimony concerning the location of the wallet." *People v. Meredith*, 29 Cal.3d 682, 695 (1981); *see also Rule 3.4 cmt. 2*. Attorneys faced with this dilemma often wonder how to turn the physical evidence (e.g., document or gun) over to the police without revealing where it came from. This can be done in a number of ways. For example, the D.C. Bar encourages lawyers to use a conduit, such as the Office of Bar Counsel, to turn in the evidence. *D.C. Ethics Op. 242* (1993).

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QUERY:

A client was indicted for murder. In a conversation with his attorney, the client admitted committing the crime and disclosed the location of the buried bodies. The attorney investigated the matter himself and, indeed, uncovered the body of one of the murder victims. The attorney did not reveal the location of the body and was indicted on charges that he violated laws requiring the reporting of a death and providing for the proper burial of a body. Is the attorney subject to discipline?

ANSWER:

No. The information was privileged, and the attorney had no legal obligation to reveal the location of the body or information about two prior, unrelated murders to which the client confessed. The attorney's ethical obligations to his client transcended the legal obligations imposed by the above-mentioned statutes. *People v. Belge*, 50 A.D.2d 1088 (1975), *aff'd*, 41 N.Y.2d 60 (1976).

EXAMPLE:

A telephone operator overheard an attorney advise a client to "get rid of the weapon." Under the "crime-fraud" exception, this conversation is not protected by the attorney-client privilege. Where a lawyer's advice is being sought or used to perpetrate a crime or fraud, the resulting conversations are not protected. *Clark v. State*, 261 S.W.2d 339 (Tex. Crim. App. 1953).

Restatement (Third) of the Law Governing Lawyers § 119 (2000), however, permits a lawyer to take temporary possession of physical evidence of a crime to examine it and subject it to tests "that do not alter or destroy material characteristics of the evidence," (e.g., DNA blood testing or ballistic testing of a weapon) but must notify the prosecuting authorities and turn the evidence over to them. *See Rule 3.4 annot. (2015) (under the heading "Duty to Safeguard Physical Evidence of Client Crimes")*; *see also Rule 3.4 cmt. 2*.

Clearly, a lawyer can photograph a crime scene. The pictures constitute the lawyer's privileged work product prepared in anticipation of litigation. However, as soon as a lawyer takes physical possession of the fruits or instruments of a crime, the lawyer faces the danger of being charged with the crime of hindering prosecution (as an accessory after the fact). As such, the lawyer should be very careful to comply with the state's rules regarding taking possession of physical evidence of a client's crime. *See Rule 3.4 cmt. 2*.

9. Joint Representation

When a lawyer undertakes to represent multiple clients in the same matter (e.g., to form a business for them or to defend them together in civil or criminal conspiracy matters), the lawyer must reveal all confidential information to the co-clients and keep all of them equally and fully informed. *ABA Formal Op. 08-450 (2008)*. The attorney should carefully explain to co-clients that an otherwise privileged communication by a co-client to the attorney is privileged against third persons, but is not privileged in subsequent adverse proceedings between the co-clients. Generally, an attorney who represents two or more clients in the same matter must, at the outset, advise them of the lawyer's duty to share information and the potential conflicts of interest. *Rule 1.7 cmt. 18*.

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If one co-client provides the attorney with confidential information on matters that are adverse or antagonistic to the interests of the other co-client, failure to reveal that information to all co-clients could violate the lawyer's duty of individual loyalty to all co-clients. *Rule 1.7 cmt. 3*. On the other hand, disclosure would be contrary to the disclosing client's legitimate expectation of confidentiality. When this conflict of interest arises, then absent a prior "keep secrets" or, alternatively, "no secrets" agreement (regarding the need for free flow of all information), the lawyer, without compromising the duty owed to either client, must withdraw from further representation of both co-clients. *Rule 1.16(a)(1)*; *A.B.A. Formal Op. 08-450 (2008)*. Perhaps one remedy for this dilemma is for the lawyer to undertake a detailed written agreement with the clients at the outset, specifically defining the information flow without requiring the lawyer to withdraw (e.g., either a "no secrets," full disclosure to all clients approach, or a "keep secrets" approach). *Thomas E. Spahn, Keeping Secrets or Telling Tales in Joint Representations: Part I, 79 U.S.L.W. 2571 (2011)*.

One co-client may not waive the attorney-client privilege with respect to a confidential communication made by another co-client. The co-client entitled to the privilege must, himself, agree to waive it. Of course, the co-client's common attorney, as an agent of both, has apparent and implied authority to waive the privilege for any of the co-clients.

Similar to the rules governing an attorney representing co-clients are the rules governing attorneys representing separate clients who join together for the clients' common interest, to share information and coordinate their positions (i.e., joint defense group). The same basic rules for co-clients apply in this situation.

EXAMPLE:

Clients A, B, C, and D were indicted for conspiracy to defraud investors. Each retained separate counsel, but all defendants share confidential information and communications in their joint defense, e.g., joint settlement discussions or trial strategy sessions. The confidential privilege remains and can be invoked against third parties, even though the conversations occurred in the presence of third persons (all of the co-conspirators and their respective attorneys). The attorneys should enter a written joint defense agreement setting forth the scope of the agreement to preserve confidences.

10. Non-class Action Aggregate Settlements

"An aggregate settlement occurs when an attorney, who represents two or more clients (frequently scores of clients) settles the entire case on behalf of all of those clients without individual negotiations on behalf of any one client." *Arce v. Burrow, 958 S.W.2d at 245 (Tex. 1997)*. The agreement offer almost always contains a "walk-away" clause, allowing the offeror (the defendant) to revoke the offer unless all of the lawyer's clients accept the settlement offer. Aggregate settlements arise most frequently in mass tort actions (asbestos and defective products such as pharmaceuticals and motor vehicles, where one firm represents multiple injured clients. In such suits, the manufacturers of the defective product or drug frequently offer plaintiffs' counsel a group settlement for all claims, leaving it up to plaintiffs' counsel's judgment to dole out separate amounts to each of the lawyer's clients. Aggregate settlement actions are distinct from class actions (in which the court defines class members), and are distinct from consolidation (in which the court

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orders separate actions involuntarily joined into one court). In aggregate settlements or aggregate plea offers, every client must consent. *Rule 1.2(a); Rule 1.8(g); see also Rule 1.8 cmt. 13.*

“[T]hrough most of the last half-century, courts have held that class certification is generally not appropriate for mass personal injury claims in which individual differences among claimants arguably outweigh factual and legal commonalities. . . . [T]he modern trend is to deny [class] certification because individual issues predominate.” *Rudlin & Graham, Toxic Torts: A Primer*, 17 *Nat Resources & Env’t*, 210 at 212.

When a lawyer is seeking to obtain the informed consent of multiple clients, whose claims or defenses are jointly negotiated, in making, accepting, or rejecting an offer, an aggregate settlement, or, in a criminal case, an aggregate agreement as to guilt or a nolo contendere plea, Rule 1.8(g) requires that the following categories of information, at a minimum, must be disclosed to all clients:

1. The nature and existence of all claims, pleas, and defenses involved;
2. How the settlement funds will be allocated;
3. The total amount of the settlement;
4. The method to be used to apportion costs among the parties; and
5. The total fees and costs to be paid to the lawyer. *Rule 1.8 cmt. 13; A.B.A. Formal Op. 06-438 (2006).*

This required disclosure must be made in the context of each settlement offer made to each client, and clients’ informed consent cannot be obtained in advance of the offer. *A.B.A. Formal Op. 06-438 (2006)*. These requirements deter lawyers from favoring one client over another. They also reduce the risk that the lawyer may be motivated to settle a number of claims and reap a substantial legal fee without diligently developing each client’s claim.

All clients (100%) must agree in a signed writing before the aggregate settlement can be accepted; if any do not, then the offer or plea may be withdrawn, and the lawyer may be required to withdraw from representation of all the clients. *Id.* It is not uncommon for individual clients to withhold acceptance of the settlement terms in hopes of gaining a larger allocation of the settlement pot. A lawyer representing multiple clients cannot use a retainer agreement calling for a majority vote of the clients to accept an aggregate settlement offer. *Id.*; *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 898 *A.2d* 512 (*N.J.* 2006). In April 2008, the American Law Institute proposed an amendment to Rule 1.8(g) to allow clients to give informed consent in advance, and to be bound to the aggregate settlement if a substantial majority of the claimants represented by the attorney consent to the settlement. *Am. L. Inst., Principles of the Law Aggregate Litigation (Tentative Draft No. 1, April 7, 2008)*. This amendment, however, has not been adopted in the A.B.A. Model Rules. *See 44 Hofstra L. rev.* 291 (2015).

11. Fiduciary Exception

Where a lawyer is retained to advise a fiduciary (e.g., executor, trustee, or corporate director) and the fiduciary is sued by beneficiaries of the trust for breach of the fiduciary’s duty, the attorney-client privilege will not attach for the fiduciary’s benefit involving communications between the

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fiduciary and lawyer related to the fiduciary's duty vis-a-vis the beneficiaries. The beneficiaries are the parties entitled to the attorney-client privilege in such circumstances. *Rule 1.7 cmts. 9 and 27.*

EXAMPLE:

When beneficiaries of a trust or an estate sue the trustee or the executor for breach of fiduciary duty, the defendant generally cannot assert the attorney-client privilege on communications with a lawyer on trust or estate matters. *See United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2329 (2011) (discussing the common law fiduciary duty in a private trust context, but noting that the government, as a trustee of Indian funds, does not have the same fiduciary duty to disclose all information related to trust management); Hoopes v. Carota, 74 N.Y.2d 716, 718 (1989); Restatement (Third) of the Law Governing Lawyers § 84 (2000).* The privilege under such circumstances belongs to the trust and, therefore, the trust beneficiaries.

EXAMPLE:

A shareholder derivative action likewise creates an exception to the attorney-client privilege, under the fiduciary exception, where a director consulted with the corporation's attorney on corporate activity and management discussions which became the subject of a shareholders' derivative action. The substance of these otherwise confidential communications is discoverable by the shareholders in the derivative action.

Having reviewed the previous two examples, keep in mind that if, after issues of alleged wrongdoing have surfaced, the fiduciary or corporate manager seeks out independent counsel for his or her own defense to beneficiary or shareholder allegations, conversations between the fiduciary or manager and independent counsel will not be discoverable by third parties (including the beneficiaries or shareholders).

12. To Seek Ethical Advice

Rule 1.6(b)(4) allows disclosure of client confidential information "to secure legal advice about the lawyer's compliance with these Rules." This exception seeks to encourage lawyers, when unsure of ethical matters, to seek advice and counsel with respect to compliance with the Rules. *Rule 1.6 cmt. 9.*

13. Corporate Attorney's Duty of Disclosure

Due to several spectacular corporate collapses and scandals (Enron, WorldCom, ImClone, etc.) for which the legal profession bears significant responsibility, Rules 1.6 and 1.13 were amended to permit (but not mandate) a lawyer to climb the corporate ladder to reveal confidential information relating to the client's representation, even outside the corporate structure, to prevent the client from committing a crime or fraud or to prevent, rectify, or mitigate the substantial financial injury that may result or has resulted from the client's past crimes or fraud and in furtherance of which the client has used or is using the lawyer's services. *Rule 1.6(b)(2) and (3); Rule 1.13(b) and (c).* Thirty states have adopted Rule 1.13's reporting outside the corporate structure, as of 2016, but 15 states (including New York) do not authorize reporting outside the corporation. *29 Georgetown Jr. of Legal Ethics, 489, 526 (2016).*

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Now, isn't this logical? First, Rule 1.13(a) provides that a corporate lawyer represents the entity and not the members of the corporation. Thus, if a lawyer knows that members of the corporation are violating or intend to violate the law, and that such conduct is likely to result in substantial injury to the corporation (the client), then corporate counsel shall report this to a "higher authority" within the corporate structure, unless the corporate attorney "reasonably believes it is not necessary in the best interest of the organization to do so." *Rule 1.13(b)*. Here, there is no issue of client confidentiality since the duty is owed to the corporation, not to its constituents.

Now, what is the lawyer representing the corporation to do when one hierarchy of the corporation stonewalls the lawyer and refuses to protect the corporation? Under Rule 1.13(c), the lawyer representing the entity may reveal the illegal conduct to the extent reasonably necessary to prevent reasonably certain substantial injury to the organization, even if the lawyer's services were not being used to further the crime or fraud. Note that this disclosure option does not apply where the lawyer was hired to investigate alleged fraud or legal activity by the corporation, or to defend the corporation or its members. *Rule 1.13(d)*.

Rule 1.6 speaks of an issue not addressed by Rule 1.13: where the lawyer's services have been used by the client, then the lawyer may reveal confidential information to prevent or lessen substantial harm to the financial interests or property of, not the corporation, but, rather, a third party. *Rule 1.6(b)(2) and (3)*.

D. ATTORNEY'S WORK PRODUCT IMMUNITY

An attorney's work product often contains confidences and strategic information that should be immune from discovery. This immunity is most frequently invoked during pre-trial litigation, but can be invoked at trial in civil and criminal cases. It seeks to protect an attorney's efforts, mental process, and material prepared in anticipation of possible or actual litigation.

EXAMPLE:

Prior to the start of depositions, the attorney conducted witness preparation sessions, which were attended by the client and also by a nonlawyer litigation consultant, to aid in the witness's preparation for the deposition. The meeting in question focused on issues perceived to be central to the case.

Without even addressing the attorney-client privilege, the Third Circuit held that the conversations were protected under the work product doctrine, which is even broader in scope than the attorney-client privilege. *In re Cendant Corp. Securities Litigation*, 343 F.3d 658 (3d Cir. 2003). The witness could be asked whether her upcoming testimony was practiced or rehearsed, but she could not be queried about the substance of her conversation with the attorney or the litigation expert.

The MPRE candidate should also be aware that, notwithstanding the immunity for the attorney's work product, Federal Rule of Civil Procedure (F.R.C.P.) 26 requires a lawyer to disclose the identity of witnesses, the opinions of experts who will testify at trial, and also any pre-trial statements given by an opposing party concerning the litigation.

Under both the Federal Rules of Civil Procedure and New York law (CPLR 3101(e)), both tangible and intangible materials prepared in anticipation of litigation are discoverable if the parties

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seeking the discovery demonstrate a substantial need for the materials in order to prepare for litigation, that they are unable to obtain or reproduce the same material without undue hardship, and that to withhold the material would work a substantial hardship on the party seeking its discovery. However, absolutely protected are the subjective mental impressions, conclusions, or opinions of an attorney concerning the litigation (“opinion work product”). *(Third) of the Law Governing Lawyers* § 89 (2000).

Underlying factual information and tangible materials are not protected just because they are developed in anticipation of litigation. An adverse party is always entitled to pretrial discovery of the facts. Thus, a lawyer’s pretrial gathering of documents and letters containing relevant factual information does not cloak them in work product immunity.

EXAMPLE:

After an accident, the plaintiff’s personal injury attorney hired a private investigator to discover if there were any eyewitnesses to the accident. After many hours of tracking down leads, the investigator was successful in finding a witness.

Is the witness’s name and statement discoverable by the defendant’s attorney? Clearly the witness’s name is freely discoverable under the Federal Rules of Civil Procedure. However, the witness’s statement is the plaintiff’s attorney’s ordinary work product, produced in anticipation of litigation. A substantially similar statement is probably readily available to the defendant’s attorney. As such, the statement obtained by the plaintiff’s investigator is probably not discoverable by the defense. However, if the witness has, in the interim, become unavailable because of a memory lapse, absence from the state, or death, then the witness’s statement may be discoverable by the defense because it contains material and relevant information that cannot be reproduced. *Restatement (Third) of the Law Governing Lawyers* § 88 (2000).

As noted earlier, “opinion work product” is generally absolutely privileged. It consists of the lawyer’s subjective analysis of the case, including opinions, proposed strategies, mental impressions, and conclusions. While a court may conclude, after an in camera review, that work product information should be disclosed under the “need and hardship” test, to the extent such information contains “opinion work product,” the court will order it redacted before the material is turned over to an adversary.

Work product immunity may be waived in the same manner as the attorney-client privilege:

1. By failing to object to a production demand and voluntarily disclosing the information.
2. By using it to prepare a witness to testify, which subsequently grants opposing counsel an opportunity to review it, in advance of cross-examining the witness, for any prior inconsistencies. Federal Rule of Evidence 612 governs this as follows:
 - a. If the privileged material is used to refresh the witness’s recollection while the witness is testifying, then opposing counsel can review the material as of right.

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- b. If the privileged material was used to refresh the witness's recollection prior to her testifying, then the court can review the material and disclose it to opposing counsel if the court, in its discretion, determines it is necessary in the interests of justice. *Id.*
3. By making the content of the work product a material issue in the litigation (e.g., where the lawyer directly refers to the work product while questioning a witness). *Restatement (Third) of the Law Governing Lawyers* § 92 cmt. b (2000).
4. Where the client consults a lawyer for assistance in an ongoing or planned crime or fraud.
5. By sharing it with an expert witness retained to testify at a federal trial. Under F.R.C.P. 26, a party is required to submit reports for testifying experts, including information used by the expert in forming the opinion. This requires disclosure of all information provided to the testifying expert, including attorney opinion work product. *Regional Airport Authority of Louisville and Jefferson County v. LFG, LLC*, 460 F.3d 697 (6th Cir. 2006). In litigation, there is a difference between "testifying experts" and "consulting experts." "[M]aterial prepared by a consulting expert . . . to assist the defense in developing strategies and theories is protected by the work-product doctrine when that material reflects the expert's thoughts regarding the strengths and weaknesses of a defense theory. . . . [However] facts that are divulged by or exist independent of the attorney . . . are not protected" *Pope v. State*, 207 S.W.3d 352, 366 (Texas Crim. App. 2006). Putting an expert's name on a trial witness list "is an act similar to crossing the Rubicon in that it may waive many of the protections otherwise provided by the work-product doctrine, although it will not waive any confidential communications under the attorney-client privilege." *Id.*

E. ATTORNEY'S PERMISSIBLE DISCLOSURE OF CLIENT CONFIDENCES

A lawyer may disclose protected client confidences under certain, limited circumstances, including where:

1. The client gives informed consent to the disclosure. *Rule 1.6(a)*.
2. Disclosure is required by law or court order. *Rule 1.6(b)(6)*.
3. Disclosure is necessary to collect a fee. *Rule 1.6(b)(5)*.
4. Disclosure is necessary to defend accusations of the attorney's wrongdoing. *Id.*
5. Disclosure is necessary to prevent reasonably certain death or substantial bodily injury. *Rule 1.6(b)(1)*.
6. Disclosure is to prevent, mitigate, or rectify substantial financial injury resulting from a client's past or future fraud or crime, in furtherance of which the client has used the lawyer's services. *Rule 1.6(b)(2) and (3)*.
7. Disclosure is to prevent a substantial injury to a corporation where the corporate hierarchy refused to act on a matter clearly in violation of the law. *Rule 1.13 (b) and (c)*.

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8. Disclosure is “reasonably necessary” to accomplish the purpose of detecting and resolving conflicts “when a lawyer is negotiating to move to a new firm.” *A.B.A. Formal Op. 09-455 (2009)*. In the rare instance in which the client’s identity is privileged, the firm may be able to conduct an analysis based on information from sources other than the moving lawyer, or the lawyer may be able to obtain the client’s consent to the disclosure, but, if not, the lawyer may simply be unable to join the new firm. *Id.*

CHAPTER IV

CONFLICTS OF INTEREST

A client is entitled to a lawyer's undivided loyalty. Any interests or influences that may lessen that duty of loyalty or that would adversely affect the lawyer's judgment, pose a potential conflict of interest between the lawyer's duty of loyalty and complete devotion to the client's matter. If there is a substantial risk that the lawyer's representation of the current client will be materially and adversely affected by the lawyer's conflicting interest, the lawyer shall decline the legal representation or withdraw from further representation. Examples of potential conflicts of interest that might divide a lawyer's loyalty frequently arise when the lawyer: (a) represents multiple clients in a transaction, (b) is paid by a third person to represent a client, or (c) represents a new client against a current or former client.

Generally, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. *Rule 1.7(a)*. However, the client's knowledgeable and informed consent to the attorney's conflict of interest, confirmed in writing, can cure the conflict in most situations. *Restatement (Third) of the Law Governing Lawyers § 122 (2000)*. Rule 1.7(b) states that even when the lawyer has written, informed consent, the lawyer must also "reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client." *Rule 1.7(b)(1)*.

In litigation, the remedy is for a party to make a motion to disqualify the firm having the conflict of interest. Because such motions are often interposed as a litigation tactic, they are viewed with disfavor and require a high degree of proof. *Merck Eprova AG v. Prothera, Inc.*, 607 F. Supp. 2d 201 (S.D.N.Y. 2009).

To avoid undertaking legal representation where a conflict may exist, law firms should implement appropriate procedures to ascertain the interests of their clients and whether a conflict exists. *Rules 1.7 and 1.8*. Where a lawyer undertakes a matter where a conflict was reasonably apparent, the resulting sanctions may include: (a) disqualification of the firm, (b) loss of the right to a legal fee, (c) disciplinary sanctions, and/or (d) injunction in non-litigated matters. *Restatement (Third) of the Law Governing Lawyers § 121 cmt. f (2000)*.

A. CONFLICT WITH AN ATTORNEY'S OWN PERSONAL INTEREST

A lawyer cannot accept or continue legal employment if there is a "substantial risk" (*Restatement (Third) of the Law Governing Lawyers § 121 cmt. f (2000)*) that the lawyer's own interests may adversely affect the lawyer's ability to exercise sound professional judgment, services and advice given to the client, unless the lawyer reasonably believes that the conflict will not adversely affect the representation, makes a full disclosure to the client of the possible adverse effects of such representation in language that can be reasonably understood by the client, and receives the client's informed consent, confirmed in writing. *Rules 1.7(b) and 1.8(a)*.

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EXAMPLE:

Alpha, a lawyer, and Client both have individual claims against Y. Alpha cannot join Client's claim with his own because there will be an inherent conflict if Y talks of settling or Y has assets sufficient to satisfy both claims.

Rule 1.8(j) bans sexual relations with a client unless a consensual sexual relationship already existed between lawyer and client at the commencement of the client-lawyer relationship. This prophylactic rule seeks to prevent clients from unfair sexual exploitation by attorneys who sit in a position of trust and confidence on legal matters. It also seeks to prevent lawyers from situations where a sexual relationship with a client may impair their professional judgment. Note that this is a personal disqualification and not a vicarious disqualification of all members in that lawyer's law firm. *Rule 1.8(j) & (k)*. A lawyer having sex with a client violates the fiduciary duty owed by the lawyer, rendering the lawyer liable for such claims in a court action. *21 Geo. J. Legal Ethics 1159, 1176 (2008)*.

The sex with client prohibition also applies to sex with a member of an organization (corporation) who supervises, directly or regularly consults with that lawyer's firm.

B. THE LAWYER AS A WITNESS

Under Rule 3.7, if a lawyer knows or anticipates that he or she will likely be called as a necessary witness on a disputed, material issue in litigation, the lawyer must not act as an advocate at trial unless:

1. The testimony relates solely to an uncontested matter, *Rule 3.7(a)(1)*;
2. The testimony will relate solely to the nature and value of legal services rendered in the case, *Rule 3.7(a)(2)*; or
3. Recusal would impose a substantial hardship on the client because of the distinctive value of the lawyer in the particular case, *Rule 3.7(a)(3)*. Note that the additional costs of retaining substitute counsel do not constitute "substantial hardship." *United States v. Kwang Fu Peng, 766 F.2d 82 (2d Cir. 1985)*.

The Rules discourage lawyers from testifying in their clients' cases because an advocate who becomes a witness is in the unseemly and ineffective position of arguing the lawyer's own credibility. Thus, the lawyer becomes more easily impeachable and may hurt the client's case. The advocate-witness rule, however, is not applicable when the attorney appears as a *pro se* litigant. *Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), cert. denied, 475 U.S. 1129*.

EXAMPLE:

A lawyer witnessed his client's waiver of Miranda rights and served as interpreter for the client's confession at the police station. On motion by the prosecutor, the attorney was disqualified as defense counsel because the lawyer had become a necessary witness for the State on the issues of the voluntariness of the confession and the accuracy of the translation. *United States v. Gomez, 594 F. Supp. 1185 (D.R.I. 1984)*.

CONFLICTS OF INTEREST

These disqualification rules apply only to an advocate at trial. Thus, an otherwise disqualified advocate may, nevertheless, represent a client in pretrial discovery and motion proceedings and generally may participate after the trial in the appeal. *A.B.A. Informal Ops.* 1446 (1980), 1503 (1983) and 1529 (1989). If, however, the lawyer's testimony is disputed, the lawyer should refrain from participating in a pretrial motion or an appeal in which the lawyer's disputed testimony is a material issue. Instead, another lawyer should argue the motion or appeal. *A.B.A. Informal Op.* 1529 (1989).

When determining whether to direct counsel to withdraw, the court should consider whether the lawyer ought to be called as a witness on behalf of his client, not whether the attorney's adversary intends to call the attorney. *Murray v. Metropolitan Life Ins. Co.*, 583 F.3d 173 (2d Cir. 2009); *Lefkowitz v. Mr. Man*, 111 A.D.2d 119, 121 (1st Dep't 1985), appeal dismissed, 65 N.Y.2d 1053 (1985).

A lawyer shall not act as an advocate at a trial in which the lawyer is "likely" to be a "necessary" witness. Thus, if the attorney's testimony is merely cumulative, it will not disqualify the attorney. Rule 3.7(a) prohibits the lawyer from continuing as an advocate once the lawyer is deemed a necessary witness. Rule 3.7 allows someone else in the firm (other than the testifying lawyer) to continue in the trial, unless there would be a conflict of interest under Rule 1.7 (conflict with a present client) or Rule 1.9 (conflict with a former client). *Rule 3.7(6)*. For example, if there is likely to be substantial conflict between the interests of the client and that of the lawyer, then the conflict of interest requires compliance with Rule 1.7, even though the lawyer might otherwise be permitted to serve as a testifying witness and advocate because the lawyer's disqualification would work a substantial hardship on the client. *Rule 3.7 cmt. 10*.

[W]hether a witness 'ought' to testify is not alone determined by the fact that he has relevant knowledge or was involved in the transaction at issue. Disqualification may be required only when it is likely that the testimony to be given by the witness is necessary.... Testimony may be relevant and even highly useful but still not strictly necessary.

S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 445 (1987). "A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence...." *Id.*

The advocate-witness disqualification rules also apply to a prosecutor who may be called by the defendant as a witness or where the prosecutor may refer to his or her pretrial involvement in the case. *United States v. Hosford*, 782 F.2d 936 (11th Cir.), cert. denied, 476 U.S. 1118 (1986). The prosecutor should be excused from the case by a pretrial motion. *People v. Paperno*, 54 N.Y.2d 294 (1981); *People v. Ortiz*, 54 N.Y.2d 288 (1981).

C. REFUNDING OF LEGAL FEES UPON WITHDRAWAL

A lawyer who withdraws from employment shall promptly refund any advance payment of fees or expenses that has not been earned or incurred. *Rule 1.16(d)*. An attorney may be suspended for not returning the balance of an advance fee not earned. *Matter of Cleere v. Ontario County Bar Ass'n.*, 39 A.D.2d 132 (4th Dep't 1972) (three-month suspension ordered).

D. ACQUIRING AN INTEREST IN LITIGATION

Generally, a lawyer may not acquire a proprietary interest in the cause of action or subject matter of litigation. However, a lawyer (a) may acquire a lien granted by law to secure the client's payment of a legal fee or litigation expenses, and (b), in a civil case, may contract with a client for a reasonable contingent fee. *Rule 1.8(i)(2)*.

A lawyer may not lend money even to a low-income client for living expenses in connection with pending or contemplated litigation. Permitting a lawyer to do so might cause the lawyer to encourage clients to bring or continue litigating suits they might not otherwise. *Rule 1.8(e)*. In that regard, if a client owes money to her lawyer, the attorney may have the lawyer's own financial interest foremost in mind while handling the litigation rather than the client's best interest. *Nebraska v. Shefren*, 690 N.W.2d 776 (Neb. 2005); *Shea v. Virginia State Bar*, 374 S.E.2d 63, 64 (Va. 1988); *Ex rel. Oklahoma Bar Ass'n v. Smolen*, 837 P.2d 894, 896 n.5 (1992).

EXAMPLE:

Client, who was awaiting trial of his serious auto accident, asked Arno, his lawyer, for a loan. Arno properly declined, citing Rule 1.8, which states, "[a] lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation..." *Rule 1.8(e)*. Note, that ten states have not adopted Rule 1.8(e) and allow lawyers to make such loans. 28 *Georgetown Jr. of Legal Ethics*, 39, 40 and 62 (2015).

What is a destitute client to do after being severely injured and becoming unemployed?

Unfortunately, many lawyers are referring destitute plaintiffs, who are awaiting a trial and a potential money judgment, to "alternative litigation financing." *New York State Bar Ass'n Com. On Professional Ethics Op. 666* (1994). This is a contingent advancement (contingent on the client recovering a money judgment) with extremely high interest rates (from 20 to 200% per year). In *Echeverria v. Estate of Lindner*, 7 Misc.3d 1019 (A), the court upheld a \$25,000 loan at 3.85% per month (46% per year). If the client does not recover, the lender forfeits the amount advanced to the client. The lawyer cannot be paid a fee by the finance company, and the attorney must explain the extraordinary high interest rate. In *NYC Bar Assn. Com. on Professional Ethics Op. 2011-2*, the committee warned lawyers that there can be no confidential disclosure to the financial company without informed consent of the client.

EXAMPLE:

May an attorney post a bond either for an injunction or to secure the client's release from jail?

No, not in most cases, because of the inherent conflict of interest. Remember, Rule 1.8(e) prohibits an attorney from "provid[ing] financial assistance to a client in connection with pending or contemplated litigation."

The A.B.A. has authorized a lawyer to post the money for a bond in the "rarest of circumstances where there is no significant risk that the lawyer's representation will be limited by her personal interest in recovering the amount advanced." The factors that permit the lawyer to post the client's bond are whether:

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1. The amount is trivial;
2. The lawyer is a family friend and expects to be reimbursed by the family;
3. The lawyer is committed not to suing the client if the bail is not repaid; or
4. There is little risk that the client will cause the bond to be forfeited. *A.B.A. Formal Op. 04-434 (2004)*.

As discussed earlier, a lawyer may advance or guarantee (a form of a loan) the court costs and expenses of litigation, such as hiring private investigators, expert witnesses, stenographers and doctors. *Rule 1.8(e)*. Moreover, the repayment by the client of advanced court costs and expenses of litigation may be contingent on the outcome of the matter. *Rule 1.8(e)(1)*. If a client is indigent, a lawyer may even pay outright these court expenses. “[A] lawyer representing an indigent client may pay [more than just advance as a loan] court costs and expenses of litigation on behalf of the client.” *Rule 1.8(e)(2)*.

E. ATTORNEY’S BUSINESS TRANSACTIONS WITH A CLIENT

A lawyer must take great care when entering into a business transaction with a client if the lawyer’s interests may be adverse to those of his client (i.e., the lawyer could make money at the client’s expense). The lawyer may enter into a business arrangement with a client provided the client consents in a *writing signed by the client*, and the terms and the lawyer’s interest are fully disclosed to the client in writing. *Rule 1.8(a)*. The transaction also must be fair and reasonable. *Rule 1.8(a)(1)*. There must be full written disclosure in plain language and the client must be advised of the desirability of seeking independent legal counsel in the transaction. *Rule 1.8(a)(2)*. The client must be given a reasonable opportunity to seek the advice of independent counsel, and the client’s consent must be in writing signed by the client. *Rule 1.8(a)(3)*. The writing must also fully inform the client of the lawyer’s role in the transactions, including whether the lawyer is representing the client in the transaction. *Rule 1.8(a)(3)*. The burden of proving the fairness of the transaction and the provision of full disclosure falls upon the lawyer. All lawyers in a firm must abide by these rules even if they are not personally involved in representing the client. *Rule 1.8(k)*.

EXAMPLE:

A lawyer was suspended from the practice of law when the lawyer borrowed money from the client without providing the client with complete written disclosure of his precarious financial situation and without securing the loan with any collateral in the event of a default by the lawyer. *Matter of Johnson, 826 P.2d 186 (Wash. 1992)*. Similarly, a lawyer may be suspended if without proper written disclosure the lawyer:

1. lends money to a client not involved in litigation;
2. accepts as payment of the lawyer’s fee property transferred by the client to the lawyer (*Rule 1.8 cmt. 1*);
3. buys or sells property to a client, *Rule 1.8(a)*; or
4. holds a security interest (e.g., a mortgage on the client’s realty or a valuable ring) in property to guarantee payment of the legal fee.

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EXAMPLE:

A lawyer or law firm may acquire an ownership interest (shares of stock) in their corporate clients in connection with performing legal services, either by taking equity in lieu of cash or simply by investing money in return for equity as an investment opportunity. *A.B.A. Formal Op. 00-418 (2000)*. Remember, the transaction, in all events, must be fair and reasonable coupled with written full disclosure, a written offer, and written consent signed by the client.

Also, where the lawyer enters a business transaction with the client of another member of the law firm, compliance with Rule 1.8(a) is required (e.g., fair and reasonable transaction, full disclosure in writing, independent legal counsel should be consulted, and the client's signed consent).

F. CONFLICTS WITH CURRENT OR FORMER CLIENTS

1. Conflicts With Current Clients

a. Generally

Rule 1.7(a) prohibits a lawyer or law firm from undertaking representation (even in a totally unrelated matter) "directly adverse" to a client. The Rules prohibit a lawyer from accepting employment requiring the lawyer to commence an action against a present client even in a totally unrelated matter. *Rule 1.7(b). Cinema 5, Ltd. v. Cinema, Inc., 528 F.2d 1384 (2d Cir. 1976)* (adverse representation of an existing client is prima facie improper); *In re Kelly v. Reason, 23 N.Y.2d 368, 378 (1968)* (where "divided loyalties exist, a lawyer may inadvertently, and despite the best of motives, be influenced and act detrimentally to the client...."); *Fund of Funds, Ltd. v. Arthur Anderson Co., 567 F.2d 225, 232-33 (2d Cir. 1977)* (avoiding prejudice in an action involving adverse representation of an existing client is a "goal impossible to achieve").

EXAMPLE:

A law firm undertook to represent Client in a civil assault and battery claim against Client. At the same time, the firm was representing Client in a collection matter against a third party. Although the two matters were in no way "substantially related" (which is the Rule 1.9(a) standard to be used to determine whether a lawyer may accept employment against a former client), the court concluded: "[w]hen a client engages the services of a lawyer in a given piece of business, he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued and his home is attacked by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed and the profession is exposed to the charge that it is interested only in money." *Grievance Committee v. Rottner, 152 Conn. 59, 203 A.2d 82, 84 (1964)*.

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EXAMPLE:

In *Cinema 5, Ltd. v. Cinerama*, 528 F.2d 1384 (2d Cir. 1976), Attorney Alpha's firm represented Cinerama, a movie distributor, in an antitrust action filed by various upstate theater operators. Two years later, but while the class action was still pending, Alpha's firm was retained to sue Cinema and other defendants for conspiracy to create a monopoly and restrain competition in New York City movie theaters. Alpha argued that since there was no "substantial relationship" between the two matters, Alpha's disqualification was not required.

The Second Circuit disagreed and disqualified Alpha. "The propriety of [Alpha's] conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty an attorney owes to each of his clients.... When Cinerama retained [Alpha] as its attorney in the [earlier matter] it was entitled to feel that at least until the litigation was at an end, it had his undivided loyalty as its advocate.... Because 'no man can serve two masters' *Matthew 6:24*, it had the right to expect that he would 'accept no retainer to do anything that might be adverse to his client's interests.'"

New York's Appellate Division, Third Department, was the first New York Appellate Court to adopt the *Cinema 5* rationale. In *Aerojet Properties, Inc. v. State of New York*, 138 A.D.2d 39 (3d Dep't 1988), the court first distinguished the "substantial relationship" test that customarily applies to a conflict of interest with a former client. "Under this standard, disqualification will result where the party seeking that relief establishes a substantial relationship between the issues in the litigation and the subject matter of the prior representation, or where counsel formerly had access to confidential material substantially related to the current litigation." The Third Department then noted that when there is simultaneous representation of adverse clients by one lawyer, the possible conflict of interest requires application of a more stringent test.

[A]dverse representation is prima facie improper ... and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his [or her] representation. In contrast to the substantial relationship standard, the *Cinema 5* standard places the burden of proof on the party opposing disqualification and shifts the focus from the similarities in the litigation to counsel's fundamental duty of undivided loyalty to each client.... *Id. at 41*.

EXAMPLE:

Where an attorney is currently representing a client, usually a per se (automatic) standard of disqualification is applied to a prospective client seeking representation in a matter adverse to an existing client. The per se disqualification standard applies even if the prospective client is retained and the prior client representation is abruptly discontinued prior to the disqualification motion. More colloquially, this is referred to as the "hot potato" rule, which holds that an attorney may not avoid a disqualifying motion by dropping the less desirable client like a "hot potato." *Merck Eprova AG v. Prothera, Inc.*, 607 F. Supp. 2d 201 (S.D.N.Y. 2009).

Now, we know that a lawyer is prohibited from representing a new client if that representation

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will be directly adverse to the interests of a lawyer's current client, even if the new matter is totally unrelated to the lawyer's current client's matter.

We also know, however, that a lawyer can represent the interest of a new client on a matter that is directly adverse to the interests of a "former" client, so long as the new representation is not substantially related to the former client's matter. *Rule 1.9*.

EXAMPLE:

Attorney Alpha represents client X on a matter. Then client Y walks into Attorney Alpha's office with a lucrative and totally unrelated matter involving a claim against X. Can Alpha ethically accept the new matter from Y? No! The interests of the two clients are adverse, and Rule 1.7 prohibits a lawyer from representing a client if the representation will be directly adverse to X, a current client.

Now, can Attorney Alpha quickly make the existing client (client X) a "former client," by unilaterally withdrawing, waiting a week and accepting the new, much more lucrative matter from client Y? Forgetaboutit! In a New Jersey case, Alpha was representing a woman on a business transaction. Alpha then sought to represent a testator's large estate against the preliminary claims of the testator's live-in girlfriend, who was the woman he had been representing in the unrelated business transaction. Alpha dropped the "girlfriend" as a client like a "hot potato" to avoid the conflict with the estate, a much more remunerative client. Alpha was disqualified with an admonition from the federal court. *Santacroce v. Neff*, 134 F. Supp. 2d 366 (D. N.J. 2001).

Accordingly, when a prospective client seeks legal representation in a matter that is adverse to the interests of a lawyer's current client, the lawyer cannot simply convert the current client to a "former" client by unilaterally withdrawing from the former representation. *Restatement (Third) of the Law Governing Lawyers § 121 cmt. e(i) (2000)*.

An exception to the "hot potato" rule is where two corporate client's merge (contrasted with the merger of two law firms) creating an unforeseeable conflict, then a lawyer may pick and choose which client to represent since the conflict was not caused by anything the lawyer did, but rather was fortuitous based on client activity. *Rule 1.7 cmt. 5; Restatement (Third) of the Law Governing Lawyers § 121 cmt. j, ill. 11 (2000); Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121 (N.D. Ohio 1990).

Law firms can easily avoid the conflict dilemma by instituting procedures to avoid accepting new matters that create a conflict of interest. In that regard, Rule 5.1 and Rule 5.3 require supervising lawyers (usually partners) to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all [firm personnel] conform to the rules of professional conduct."

CONFLICTS OF INTEREST

EXAMPLE:

Attorney Alpha represents Mary in a personal injury action arising out of a defective Coke bottle. May Attorney Alpha now agree to represent Mary's husband, Mike, in a divorce action against Mary?

No, even though the two matters are totally unrelated, and Attorney Alpha probably learned no confidential information while representing Mary in the personal injury action that could be used in the divorce action, a lawyer cannot sue a current client. Such action would constitute representation "directly adverse" to a present client. Mary and her husband could, of course, provide written consent to Alpha's representation of her husband; and the consent would cure the conflict provided the representation is not objectively unreasonable.

EXAMPLE:

Alpha represents Client A in a matrimonial claim asserted by A's spouse. Client B wishes to sue A for breach of a copyright. The two suits are totally unrelated. Alpha may not undertake B's suit against A unless both A & B give informed, written consent.

If the lawyer obtains informed consent from each affected client confirmed in writing, and a reasonable belief that diligent and competent representation can be provided to both clients, then a lawyer may act as an advocate in one matter against a person that the lawyer represents in some other matter. Where the proposed representation of a new client is not related to or adverse to the lawyer's existing client, but the lawyer foresees that disputes could arise between the clients in other unrelated matters, the lawyer can avoid the potential conflict by entering an agreement with the new client to limit the legal representation so that it cannot extend to matters adverse to the lawyer's existing client. Such an agreement can eliminate the need to obtain the written, informed consent of the lawyer's existing client. *Restatement (Third) of the Law Governing Lawyers § 19 (2000)*. See *Rule 1.7 cmt. 22 - Consent to Future Conflict*.

The rationale behind the rule set forth in *Cinema 5* and *Aerojet* is the existing client's expectation of undivided loyalty. *A.B.A. Informal Op. 1495 (1982)* held that this rule should apply even when the client employs almost all of the attorneys in the area, thereby making it difficult for another party to retain equivalent competent counsel.

Note that a law firm with the informed consent of both clients can simultaneously represent antagonistic parties as long as the law firm does not become involved in matters in which the two clients are adverse to one another.

EXAMPLE:

For years, Law Firm has represented the consumer mortgage closing department of local Bank. It also has represented local Restaurant in its zoning, catering, and labor matters. Restaurant entered an unsecured commercial loan agreement with Bank; Law Firm did not represent either party with respect to that agreement. If Restaurant now sues Bank for breach of the loan agreement, Law Firm cannot represent either side. It can, however, continue to represent both clients in matters unrelated to the

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loan litigation, since such representation poses no threat of a conflict of interest or any compromise of individual loyalty to both clients. Thus, by representing Bank's interest in its mortgage department, Law Firm has no conflict in continued representation of Restaurant in its matters totally unrelated to the litigation involving Bank's loan.

b. Conflicts in Civil Litigation

As discussed above, the attorney cannot represent one client in suing another client currently represented by the same lawyer, even if the matters are totally unrelated. *Rule 1.7(a) cmt. c.* Thus, lawyers associated with the same firm cannot represent both sides of a single case before a tribunal. *Rule 1.7(a)(1) and 1.10.* A conflict of this type cannot be waived. *Rule 1.7(b)(3).*

This rule simply prohibits a lawyer from representing a third party in suing a current client. This rule frequently is relaxed when the lawyer is performing non-litigation matters for the current client. Thus, a bond lawyer doing work for a municipality was not prevented from asserting an unrelated tort claim by another client against the same municipality. *City Counsel v. Sakoi*, 570 P.2d 565 (Hawaii 1977).

In addition, a lawyer may not represent two people in the same legal matter if the interests of each client diverge so that effective representation cannot be rendered to each client. A lawyer shall not undertake or continue to represent clients in the same matter if effective representation cannot be provided to both parties. *Rule 1.7.* Of course, the clients can consent to the conflict, allowing the attorney to proceed, provided the lawyer reasonably believes such representation will not be in any way adversely affected by the potential conflict. *Rule 1.7(b).* Typically, this rule is unavoidably implicated when one lawyer represents both a husband and wife in a divorce; a lender and borrower in a loan transaction; two partners creating a partnership; the buyer and seller of real estate or a business; or co-defendants in a criminal prosecution. Indeed, many jurisdictions hold that, even with the consent of both spouses, one lawyer cannot adequately represent both spouses in a matrimonial action. The very nature of the proceeding, from the tax aspects to the property settlement, is adversarial in nature and deemed not suitable for dual representation. The majority view, however, also holds, "the fact that the same attorney represented [husband and wife] in the preparation of the [settlement] agreement [does not] require an automatic nullification of the agreement." *Levine v. Levine*, 56 N.Y.2d 42, 48 (1982).

Where the lawyer represents current clients who either are opposed to each other or are aligned on the same side of litigation, the lawyer must decline representation (absent informed consent) if, by representing one current client, a substantial risk exists that representation of the other client will be adversely affected. The lawyer should objectively evaluate whether doing something for one client will adversely affect the interests and the representation of the other client. *Restatement (Third) of the Law Governing Lawyers § 121 cmt. c(iv) (2000).*

If, while an attorney is representing multiple clients in the same matter, a dispute arises creating an unconsented conflict between the concurrent clients, the attorney may not choose sides, but, rather, must withdraw from representing either party. *Rules 1.16(a)(1) and 2.2(c); Rosman v. Shapiro*, 653 F. Supp. 1441 (S.D.N.Y. 1987).

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QUERY:

Lawyer L represented partners A and B. A called L and proposed to tell him something “in confidence.” A then told L that A was actively breaching the partnership agreement. What is L’s ethical duty?

ANSWER:

L must preserve A’s secret and must withdraw from representation of the partnership, as well as of either individual, A or B, without disclosing the reason for doing so. L no longer can effectively represent these clients as the disclosure by A is a “confidence” protected by the attorney-client privilege. By nondisclosure to Partner B, Lawyer L has breached the undivided loyalty to B.

EXAMPLE:

In a two-car collision, the driver and passenger of one car were jointly represented by Attorney Alpha in suing the defendant-driver of the other car. Because the plaintiff-driver may be found to have been contributorily negligent in causing the accident with the other car, Alpha may have a duty to assert a claim by the plaintiff-passenger against the plaintiff-driver. This conflict should be fully explored before Alpha undertakes the joint representation, and, if it appears likely that a conflict will arise, Alpha should decline joint representation of both plaintiffs. “The widespread abandonment of guest-statute barriers to passengers’ recoveries against their own drivers means, as a practical matter, that a passenger will almost always be well advised to assert claims against all other drivers, including the passenger’s driver.” *C. Wolfram, Modern Legal Ethics* 353 (1986); *Tavarez v. Hill*, 23 Misc. 3d 377 (Sup. Ct. Bronx County 2009). *Ferrara v. Jordache Enterprises, Inc.*, 12 Misc.3d 769 (Sup. Ct. Kings County 2006); *Matter of Cellino*, 21 A.D.3d 229 (4th Dep’t 2005).

EXAMPLE:

A & B are injured by an explosion negligently caused by D. A & B are represented by Attorney Alpha. Alpha sues D to recover \$200,000 for A and \$200,000 for B. D has only \$50,000 in liability insurance and insufficient assets to satisfy either A or B’s claim. Joint representation by Alpha creates a conflict of interest, as neither A nor B can recover the full \$200,000 and anything recovered by one will not be recoverable by the other. Informed client consent, however, may cure this conflict.

If, in the same problem, D proposes to settle both claims by paying A \$20,000 and B \$30,000, then Alpha is obligated to disclose both settlement amounts to both A and B and to obtain their informed consent in a writing signed by A and B before settling. *Rule 1.8(g) and 1.8 cmt. c.*

EXAMPLE:

If the lawyer represents civil co-defendants, a conflict may arise if one co-defendant is more culpable than the other and should shoulder a greater amount of any judgment for the plaintiff. Ordinarily, a tort co-defendant will attempt to shift as much of the

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blame over to another named defendant and will assert a contribution or indemnification claim against another co-defendant. Thus, a conflict likely exists. Again, this possible conflict may be cured by the client's written informed consent to this possible conflict.

EXAMPLE:

Attorney A represented 350 claimants in their suits against a housing developer. Attorney A negotiated with the developer an aggregate settlement of \$1.8 million for all claimants. Client alone agreed to share in the settlement and signed a release against the builder.

The release and settlement here were deemed invalid because Client was not given a list showing the nature of all the settlements and the names and amounts to be received by the other settling plaintiffs. Rule 1.8(g) requires that a client be fully informed before consent to an aggregate settlement agreement may be given. *Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d 442 (Tex. 1985).

QUERY:

T, testator, is a widower, has no lawyer, and has never drawn a will. T's niece, N, is currently represented by Attorney Alpha on N's estate planning. N wants to recommend Alpha to T and N offers to pay Alpha any legal fee not paid by T. Can Alpha ethically represent T?

ANSWER:

It is not unusual in estate practices for a lawyer to concurrently represent family members. Alpha may represent T provided Alpha's independent professional judgment is maintained.

If N pays Alpha's fee for Alpha's legal work performed for T, then under Rule 1.8(f), Alpha must obtain T's informed consent to the fee arrangement. Alpha should advise N that Alpha represents T and Alpha cannot disclose to N any of T's confidences. *A.B.A. Formal Op. 02-428 (2002)*.

QUERY:

Attorney Alpha has represented H, husband, and W, wife, for many years. They have acquired substantial assets. H and W always meet with Alpha together and their wills, drawn by Alpha, leave everything to each other.

Recently, H met with Alpha without W. H advised Alpha that he retained another attorney, Bravo, to draft a codicil leaving substantial assets to Pine, H's girlfriend. W does not know about the codicil.

Does Alpha have a duty to disclose this to W?

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ANSWER:

No, because the conversation with H is protected by the attorney-client privilege. However, because the interests of H and W are now adverse, Alpha must withdraw from further representing both H and W. Alpha should inform both parties of his withdrawal due to a conflict of interest making joint representation of both H and W ethically impossible. Even though the withdrawal may cause W to be suspicious, Alpha may not disclose the details of the conflict with W. *Florida Bar Op. 95-4*.

QUERY:

Attorney Beta represents Jim in a zoning matter. Beta also represents Test in drawing up a new will. At the meeting with Test, Beta is advised that Test wants to remove Jim as a beneficiary in Test's will and leave Jim nothing.

Does Beta now have a conflict of interest?

ANSWER:

The A.B.A. says no. Conflicts become adverse if there is a conflict of legal rights and duties, but conflicting economic interests do not make the parties adverse. A potential beneficiary may have an expectancy, but does not have a legal right to a bequest. Usually, the preparation of a document disinheriting a beneficiary is, in the eyes of the A.B.A., a mere ministerial act. A conflict may develop, however, if Test asks Beta for advice on whether a beneficiary should be disinherited and the lawyer represents that beneficiary. This now increases the likelihood that the attorney may interfere – consciously or not – with the testator's choice by steering that client away from disinheriting Jim. *A.B.A. Formal Op. 05-434 (2004)*.

Generally, a lawyer may take inconsistent legal positions in different tribunals at different times for different clients. Thus, in one case a lawyer can argue a legal position directly contrary to the position the attorney argued for another current client in an unrelated matter unless the representation of either client would be adversely affected (e.g., one client's case could be used as precedent against the lawyer's current client in the same trial court or in the same appellate court). *Rule 1.7 cmt. 24*. However, a conflict of interest exists if there is a significant risk that the lawyer's action in representing one client will materially alter the lawyer's effectiveness in representing the other client in another matter. *Rule 1.7 cmt. 24* (listing risk factors, including where the matters are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long term interest of the clients, and the clients' reasonable expectations in retaining the lawyer).

c. Conflicts in Criminal Cases

Dual representation in criminal cases is fraught with dangerous conflicts of interest:

1. In summation to the jury, how does an attorney determine which facts should be emphasized, especially where one co-defendant is less culpable than the other?

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2. What if one co-defendant receives a favorable plea offer in exchange for testimony against the other co-defendant?
3. Which witnesses should be called where their testimony might be favorable to one co-defendant while providing testimony unfavorable to another co-defendant?

Federal Rules of Criminal Procedure 44(c) requires a trial judge to determine whether co-defendants knowingly waive the lawyer conflict and whether they recognize the risks involved in the joint representation.

EXAMPLE:

In a criminal assault case arising out of a brawl in a public place, the defendant and four co-defendants were represented by one lawyer. At the beginning of the trial, the court asked the defendant and his co-defendants if they had discussed the joint representation with the attorney and whether any of the co-defendants knew of any reason why they should not be represented by the same attorney. The court, however, never clearly informed the defendant that he had a right to separate counsel, and never attempted to alert any of the co-defendants, even in general abstract terms, to the potential conflict of interest.

After convictions, the appellate court ordered a new trial. “In a case involving so many eyewitnesses to a fight among strangers, the evidence could and did show that many witnesses were unable to identify individual defendants as participants.... Thus, counsel could hardly emphasize the weakness of the identification of one defendant without implicitly underscoring the strength of the case against one or more of the others.” *People v. Philip L.S.*, 57 N.Y.2d 820, 821 (1982). See also *United States v. Roth*, 860 F.2d 1382 (7th Cir. 1988).

EXAMPLE:

A criminal defendant was charged in a conspiracy for the criminal storage and sale of large amounts of marijuana. The lawyer he chose to represent him was also representing two other members of the conspiracy.

Here, the trial judge barred the defendant from using that lawyer because the interests of the other two clients might conflict with the interests of the defendant. The defendant was required to retain a different lawyer. In upholding the defendant’s conviction, the United States Supreme Court ruled that a trial judge may prohibit a defendant from having the lawyer of his or her choosing, even when the defendant and the other clients of the lawyer waive their right to legal counsel free from conflicts of interest, when there is “a showing of [an actual conflict of interest or] a serious potential for conflict.” *Wheat v. United States*, 486 U.S. 153, 164 (1988).

While the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to insure that a defendant will

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inexorably be represented by the lawyer whom he prefers.... Federal courts have an independent interest in insuring that criminal trials are conducted within the ethical standards of the profession and the legal proceedings appear fair to all who observe them. *Id.*

EXAMPLE:

After the two suspects were arrested, an attorney was assigned to defend them both. One of the co-defendants, Client #1, thereafter approached the attorney and advised the attorney that the other co-defendant, Client #2, had earlier confessed to committing a prior unrelated murder. Client #1 requested that the attorney go to the District Attorney and obtain favorable treatment for Client #1 in exchange for Client #1's testimony against Client #2.

Here, because Client #1 and Client #2 now have "diverging interests," the attorney may not continue to represent either one. The zealous representation of either client would force the attorney to forego the duty of undivided loyalty owed to the other in that the attorney's efforts for either client would adversely affect the interest of the other client.

The lawyer may not disclose the reasons for withdrawing. The disclosure by Client #1 is confidential information protected by the attorney-client privilege. *Rule 1.6; N.Y. State Ethics Op. 592 (1988).*

d. Non-Litigation Matters

When a lawyer represents multiple parties in non-litigation matters (e.g., forming a corporation, drawing a joint will, or buying realty), the representation is prohibited only if there is a substantial risk that by representing one client's interest, the lawyer's conduct will materially and adversely affect the duties owed to the other co-client. *Rule 1.7 cmt. 26-28; Restatement (Third) of the Law Governing Lawyers § 121 cmt. b (2000).*

Under such circumstances, the conflict of interest can be cured by the informed consent of the co-clients after full disclosure if "it is reasonably likely that the lawyer will be able to provide adequate representation to all affected clients." *Restatement (Third) of the Law Governing Lawyers § 122(2)(c).* For example, when a lawyer undertakes to represent both a buyer and seller "full disclosure requires the attorney not only to inform the prospective client of the attorney's relationship to the seller, but also to explain in detail the pitfalls that may arise in the course of the transaction which would make it desirable that the buyer have independent counsel." *In re Kamp, 194 A.2d 236, 240 (N.J. 1963).*

e. Literary or Media Rights

Rule 1.8(d) prohibits the lawyer from negotiating or making an agreement acquiring from the client the media rights to the underlying facts of the case prior to conclusion of the attorney's representation of that client. A lawyer should not even broach the subject of obtaining media rights from the client while the lawyer is representing the client. This Rule is designed to avoid the temptation that a lawyer with an interest in media rights might feel to enhance the value of those media rights in ways not necessarily in the client's best interest. This restriction cannot be waived,

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even upon the informed consent of the client. This “does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer’s fee shall consist of a share in ownership in the property . . .” provided the agreement is fair and reasonable and complies with Rule 1.8(a) governing business transactions with a client. *Rule 1.8 cmt. 9.*

2. Duties to Former Clients

a. The new matter substantially relates to the prior representation.

Under the “substantial relationship test,” once the attorney-client relationship has terminated, the lawyer is disqualified from subsequently representing new clients where the new matter is the same or is substantially related to the matters involved in the attorney’s representation of the former client, and the new representation would be “materially adverse” to the interests of the former client. *Rule 1.9(a).*

The term “substantially related” is not defined in the Rules. The Second Circuit defined such a relationship between the prior and present representation as “identical” or “essentially the same.” *Government of India v. Cook Industries, Inc., 569 F.2d 737, 739-40 (2d Cir. 1978).*

The new matter may also be “substantially related” to the former representation if the new matter is related to the former representation or it attacks the work product of the former representation.

Matters are not “substantially related” merely because they involve problems of similar type. “[A] lawyer who recurrently handled a type of problem [e.g., antitrust, zoning, tax] for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the former client.” *Rule 1.9 cmt. 2.*

Note the difference in the disqualification for conflicts with current clients versus former clients. To disqualify a lawyer or law firm involved in a conflict with a current client, the current representation need only be directly adverse to the client. *Rule 1.7(a).* The clients’ matters need not be related. *Rule 1.7 cmt. 6.* To disqualify a lawyer for a conflict with a former client under Rule 1.9(a), however, not only must the new representation be materially adverse to the former client, but the two matters must be “the same or substantially related.” When matters are substantially related, it is presumed the lawyer had access to client confidences. Thus, the possibility of disclosing a former client’s confidences results in the disqualification.

b. The new matter is unrelated to the prior matter, but counsel learned confidential matter that could be used against the lawyer’s former client.

Under Rule 1.9(c)(1), a lawyer may also be disqualified based on the former representation of a client where the attorney in the new representation possesses information acquired in the former representation to the disadvantage of the former client, unless the information has become “generally known” (i.e., it is now in the public domain and is no longer confidential information). The reader should recall that Rule 1.8, dealing with conflicts with the lawyer’s own interests, states that “a lawyer shall not use to benefit either the lawyer or a third person information relating to representation of a client to the disadvantage of the client...” *Rule 1.8(b).* Once the attorney’s representation is over, the duty of confidentiality continues. *Rule 1.9(c).*

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While the lawyer's duty of loyalty exists only for a present client, there is a requirement that the lawyer preserve a former client's confidential information. *Rule 1.9 cmt. 1*. There is no general prohibition against a lawyer accepting litigation against or taking a position adverse to a former client. The lawyer cannot, however, accept new legal employment involving the same or a substantially related matter that would be materially adverse to the interests of the former client, without the latter's consent. Thus, where the attorney drew a will or a contract for Client #1, the attorney later could not assist Client #2 in setting aside the will or bringing an action to rescind the earlier contract. Likewise, even where the new employment does not substantially relate to the new matter, the attorney should decline employment if he or she possesses confidential information that could be used to the disadvantage of the former client. *Rule 1.9(c)*.

EXAMPLE:

A lawyer who represented a lender and negotiated a loan to a borrower, or represented a creditor and obtained a judgment against a debtor, cannot subsequently agree to represent the borrower or debtor in a bankruptcy proceeding to discharge the loan or judgment.

EXAMPLE:

Five years ago, Attorney Alpha represented husband in a defamation action against husband's former employer. Today, Alpha is not disqualified from representing wife in a divorce action against former client-husband because (1) there is no substantial relationship between the two matters, and (2) any confidential information formerly acquired in Alpha's representation of husband likely is not relevant in the divorce action, and thus would not be disclosed to the husband's disadvantage.

To ensure faithful adherence to these principles, the Second Circuit has held that an attorney may be disqualified from representing a client in a particular case if:

1. The moving party is a former client of the adverse party's counsel; and
2. There is a "substantial relationship" between the subject matter of the counsel's prior representation of the moving party; or
3. The attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the moving party, even if that former representation was unrelated to the current matter. *Rule 1.9(c)*; *Evans v. Artek Systems Corp.*, 715 F.2d 788, 791 (2d Cir. 1983); *INA Underwriters Ins. Co. v. Nalibotsky*, 594 F. Supp. 1199 (E.D. Pa. 1984); *National Texture Corporation v. Hymes*, 282 N.W.2d 890 (Minn. 1979).

"To obtain disqualification of the attorney, the former client need not show that confidential information necessarily will be disclosed in the course of the litigation; rather, a reasonable probability of disclosure should suffice." *Greene v. Greene*, 47 N.Y.2d 447, 453 (1979). Thus, to disqualify an attorney, a court need not require proof that the attorney actually had access to or received privileged information while representing the client in the prior case. Such a requirement, it has been said, "would put the former client to the Hobson's choice of either having to disclose privileged information in order to disqualify the former attorney or having to refrain from the

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disqualification motion altogether.” *Government of India v. Cook Industries, Inc.*, 569 F.2d 737, 740 (2d Cir. 1978). Thus, the former client is not required to prove that actual confidences were disclosed because that “inquiry would be improper as requiring the very disclosure the rule is intended to protect.” *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980).

The presumption of a conflict is rebuttable if the lawyer was involved only “briefly in the periphery for a limited and specific purpose relating solely to legal questions.” *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975); *N.Y. City 79-15* (1979). Courts inquire into whether the lawyer, in fact, personally represented the former client. “A distinction may be made between a lawyer who has been heavily involved in a matter and one who has been only peripherally involved and has dealt only with legal issues and not with factual issues.” *A.B.A. Formal Op. 99-415* (1999). For example, the head of a legal department may not be personally involved or represent a client on matters passing through that attorney’s office. Even if his name, as the head of legal aid, district attorney or corporate counsel’s office, appears on pleadings, he is not automatically deemed to have personally represented the client. If, however, he signs the pleadings, then under local court rules he is deemed to have read the pleadings and vouch for their accuracy. “[S]ubstantial responsibility’ envisions a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question. It contemplates a responsibility requiring the official to become *personally* involved to an important, material degree, in the investigative or deliberative process regarding the transactions or facts in question. *A.B.A. Formal Op. 342* (1975).

QUERY:

Attorney Alpha served as general counsel to Corporation. Brennan, the vice president of Corporation, worked feverishly in his basement on weekends and finally invented a new electric widget. Brennan consulted Alpha concerning his new invention and asked Alpha to help him obtain a patent, which Brennan applied for in Brennan’s own name.

One year later, Brennan left the employ of Corporation. Corporation claimed ownership of the patent for the electric widget. Brennan sued Corporation to resolve this dispute. Alpha defended Corporation in this action. Was Alpha’s representation of Corporation proper?

ANSWER:

No. Alpha should have withdrawn from the case voluntarily or should have been disqualified because of the possible use of prior confidential communications with a former client (Brennan’s) to that client’s disadvantage.

QUERY:

Albert Attorney’s firm represented Don, a housing developer, in a labor dispute involving episodes of picketing at a construction site. Two years later, Albert was retained by Insurance Company to sue Don for indemnification to recover for home warranty payments Insurance Company was required to make because of Don’s defective construction on the same construction site. Don moves to disqualify Albert and his firm. How should the court rule?

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ANSWER:

No disqualification because the court found no substantial relationship between the labor dispute and the subsequent warranty-indemnification suit, and no disclosures to Attorney in the labor dispute that would be relevant in the defective construction case. *Rule 1.9(a)*.

3. Prospective Clients

a. Generally

A prospective client is one who “consults” with a lawyer the possibility of forming a lawyer-client relationship. Almost every person coming into a lawyer’s office to discuss retaining the lawyer is a “prospective client.” *Rule 1.18*. A lawyer shall preserve the confidential information of a prospective client or shall refrain from using any confidential information obtained during the consultation. *Restatement (Third) of the Law Governing Lawyers § 15 cmt. c (2000)*; see also *Rule 1.18* (acknowledging the lawyer’s duty of confidentiality toward the prospective client). If the information received from the prospective client could be “significantly harmful” to that person if revealed, then the lawyer is disqualified and prohibited from representing an adverse party in the same matter or a substantially related matter.

A person who communicates with a lawyer for the purpose of disqualifying the lawyer from representing an opposing party or prospective party is not considered a “prospective client.” *Rule 1.18 cmt. [2]*.

Note “[n]ot all persons, who communicate information [personally, by mail or by e-mail] to a lawyer are entitled to [prospective client] protection under the Rule [1.18]. A person who communicates information unilaterally [out of the blue] to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ‘prospective client’ . . .” *Rule 1.18 cmt. 2*. To prevent any “reasonable client expectation,” from a lawyer’s webpage that could give an inquiring person the impression that the lawyer is willing to discuss legal matters and form a client-lawyer relationship, the lawyer should place a clear conspicuous disclaimer that there is no lawyer-client relationship simply by viewing the lawyer’s website, and that e-mail communications are not confidential. *ABA Formal Op. 10-457 (2010)*.

Rule 1.18 extends the application of Rule 1.9 (former client) to prohibit a representation adverse to the prospective client in the matter on which the lawyer was consulted, or one substantially related to it, but requires personal disqualification of the lawyer from representing interests adverse to the prospective client only if the information received could be “significantly harmful” to the prospective client (e.g., a one-hour consultation in which the prospective client disclosed his or her innermost strategies and desires regarding settlement, as well as privileged communications she had with other lawyers would require disqualification).

EXAMPLE:

The types of client information that may qualify as “significantly harmful to the prospective client are sensitive personal information, the prospective client’s financial

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information if prematurely disclosed, the prospective client's settlement position, or litigation strategies." *Wisconsin Formal Op. EF - 10-03 (Dec. 7, 2010)*.

EXAMPLE:

Jane Doe came to see Attorney Alpha and stated that her teenage daughter was molested by a neighbor 10 years ago at a summer camp. Alpha was shocked when Doe said the molester was John Smith. Alpha immediately ended the interview and told her Smith was a close personal friend.

Is Alpha disqualified from representing Smith in the Doe allegation? No. Rule 1.18 forbids a lawyer from representing a client with interests materially adverse to those of a prospective client in the same or related matter, only if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. Here, even without first agreeing that no information disclosed during the initial consultation would prohibit the lawyer from representing a different client in the matter, Alpha can represent Smith, since Alpha obtained no information that could be significantly harmful to Doe. *North Dakota State Bar Ass'n Ethics Comm., Op. 11-02 (3-2-2011)*.

b. Exceptions

i. Consent to a Conflict

Even though the attorney received "significantly harmful" confidential information from the prospective client, that attorney may represent an adverse party in the same matter if both the prospective client and the adverse party waive the conflict with informed consent confirmed in a writing. *Rule 1.18(d)(1)*.

The lawyer may demand such consent in advance of any agreement to undertake the representation consultation. "A lawyer may condition conversations with a prospective client on that person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. *Rule 1.18 cmt. 5*. "If the agreement expressly so provides the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client." *Id.*

EXAMPLE:

"[A]n attorney who represents a small corporation may represent the owners (individually) as well. Obtaining informed consent to continue representing the corporation if a dispute arises between the owners may keep the attorney from losing the corporation as a client. Informed-consent waivers should include detailed explanations of what types of conflicts may arise. General boilerplate consent waivers are less effective in preventing future disqualifications". *Douglas Hoffer, Navigating Conflict-of-Interest Disqualification Motions, Wisconsin Lawyer, Sept 2011, 8, 62*.

If the consent is broad and open-ended, ordinarily, it will probably not be effective since the risks to the client are not apparent. However, if the client is an experienced user of legal services,

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particularly, if the client is independently represented by other legal counsel when the client consents and the consent is limited to future conflicts not substantially related to the subject of the representation, the consent is deemed valid. *A.B.A. Formal Op. 05-436 (2005)*.

ii. Lawyer's Good Faith Attempt to the Limit Information Received

If the lawyer receives "significantly harmful" information from a prospective client and no informed consent to the conflict was obtained in advance, the law firm may represent an adverse client in the same matter if:

1. the lawyer who received the information from the prospective client "took reasonable measure to avoid exposure to more disqualifying information that was reasonably necessary"; and
2. the involved lawyer is screened from participating in the matter and does not receive compensation directly related to that matter. Written notice must also be provided promptly to the former prospective client. *Rule 1.8(d)(2); Restatement (Third) of the Law Governing Lawyers § 15(2) (2000); N.Y. City Bar Formal Op. 2006-1 (2006); N.Y. City Bar Formal O. 2006-2 (2006)*. This is a departure from the general rule that screening is available only in conflicts arising from government employment.

Where a client is shopping for a lawyer by visiting several different law firms, and no confidential information is revealed, then none of the multiple firms interviewed by the client are necessarily disqualified. *B.F. Goodrich v. Formosa Plastic Corp.*, 638 F. Supp. 1050, 1052-53 (S.D. Tex. 1986).

4. Representing an Organization

When a lawyer is asked to represent an organization (trust, estate, corporation, partnership or labor union), then the client represented is the entity and not the individual interests of each member in the organization (e.g., trust or estate beneficiary, partners in a partnership, or officers, directors or employees in a corporation). *See supra, Chapter III.A.3* (attorney-client privilege as it pertains to an organization).

It is generally unethical for an attorney to represent a trust or an estate as well as the beneficiary of the estate because such representation dilutes the lawyer's loyalty to each client, who generally has differing interests. *Florida Bar v. Moore*, 194 So.2d 264 (Fla. 1966); *Morales v. Field, DeGoff, Huppert & MacGowan*, 99 Cal. App. 307 (1979).

When a member of an organization makes personally inculpatory statements to corporate counsel, counsel need not keep these statements privileged because the attorney, as agent for the corporation, is required to disclose information to the corporation on matters within the scope of corporate employment. *In re Beville, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 123-25 (3d Cir. 1986).

When a lawyer for an organization knows that an officer or employee intends to violate or is violating the law (e.g., fraud or criminal wrongdoing) that may reasonably be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer has a mandatory duty to climb the corporate ladder and refer the matter to, if necessary, the highest

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authority (usually the board of directors). If internal reporting is insufficient to protect the entity-client from substantial harm, the lawyer now may report the wrongdoing to people outside the organization. *Rule 1.13(b); Restatement (Third) of the Law Governing Lawyers § 96 cmt. f (2000)*.

QUERY:

Can a lawyer serve as both legal counsel to a corporation and sit as a member on its board of directors?

ANSWER:

Yes. Although wearing both hats is not prohibited by the rules, the A.B.A. Standing Committee on Ethics warns of the following potential dangers of such a simultaneous undertaking:

1. Loss of the attorney-client privilege in board of director's discussions;
2. Impairment of the independency of the lawyer's professional judgment;
3. Impairment of the lawyer's fiduciary duty based on concern for the lawyer-director's financial gain;
4. Risk of a conflict of interest; and
5. Confusion by corporate employees that when the lawyer-director gives advice, the lawyer represents the corporation and not the individual directors. *A.B.A. Formal Op. 98-410(1998)*.

5. Conflict of Interest of Government Lawyers

a. Former Government Lawyers

Federal, state and local government agencies are among the principal employers of lawyers in the United States. Traditionally, newly admitted lawyers flock to positions within the government at an early stage in their careers to gain invaluable experience often not available to new attorneys in private practice. Once newly admitted government lawyers become seasoned attorneys, many will leave the government for lucrative private law firms eager to pay for the attorneys' government training and experience. Because so many government lawyers eventually head for private practice, the Rules specifically address them.

A lawyer currently serving as a public employee or officer (e.g., an assistant district attorney, corporation counsel, or S.E.C. staff attorney) shall not negotiate for private employment with any person involved as a party or as a lawyer for a party in a matter in which the government lawyer is participating personally and substantially. *Rule 1.11(d)(2)(ii)*. The one exception is for a lawyer serving as a law clerk for a judge, arbitrator or other adjudicated officer. Clerks are considered to be always in the job market and may negotiate for private employment provided the clerk first notifies the judge. *Rule 1.12(b)*.

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When a lawyer leaves government service, the lawyer may not represent a private client in connection with a matter in which the lawyer participated *personally* and *substantially* while she was working for the government unless the government agency gives its informed consent, confirmed in writing, to the representation. *Rule 1.11(a)*. When a government lawyer leaves government service and joins the firm of opposing counsel in the matter in which the government lawyer has been personally and substantially involved, there arises a presumption that client confidences will be shared among the attorneys in the lawyer's new firm.

EXAMPLE:

While acting as an attorney for the EPA, Alpha commenced a suit against G.E. Company for allegedly polluting the water and land near one of G.E.'s factories. After leaving the EPA, Alpha could not agree to represent an owner of polluted property located near the G.E. plant, even though Alpha's representation was not adverse to the EPA. Here, Alpha is prohibited from undertaking the new representation because it was substantially related to a matter that Alpha personally and substantially participated in as a government employee. *Rule 1.11(a)*.

If while in public employment as a government lawyer or as an officer, the attorney acquired confidential information concerning an individual, the attorney may not thereafter represent a client whose interests are materially adverse to that person if the confidential information could be used to his or her disadvantage. *Restatement (Third) of the Law Governing Lawyers § 133 (2000); Rule 1.11(b)*. Thus, in the example above, after Attorney Alpha left government employment, Alpha could not accept employment from nearby landowners whose lands were polluted in bringing an action against G.E., because Alpha likely has confidential government information about G.E. that could be used to G.E.'s material disadvantage. *Rule 1.11(b)*.

However, another lawyer in the firm may represent a client in such a matter provided:

1. The disqualified lawyer is "screened" from any participation or discussion of the matter (by constructing an "ethics wall") and shares no part of the fee therefrom; and
2. Written notice of the screening procedure is given to the government agency involved to insure sufficient compliance with the screening procedures. *Rule 1.11(b)*.

If information about an individual is available only to a government agency, a government attorney should not be allowed to leave the agency and sell or adversely use that information to benefit a new client. The Rules prevent the lawyer from representing a private client whose interests are adverse to such an individual in a matter in which the information could be used to the disadvantage of the individual. The lawyer's new firm may, however, undertake the matter upon setting up the "screening" procedure. *Rule 1.11(c); Restatement (Third) of the Law Governing Lawyers § 124 cmt. e (2000)*.

These same basic rules apply to judges who leave the bench and go back into private practice or begin to serve as arbitrators or mediators. Judges may not represent a client in a matter in which they participated personally and substantially as a judge, arbitrator, or law clerk, unless all parties to the proceeding consent after consultation. *Rule 1.12*. If no adequate consent is forthcoming, then the disqualified lawyer's entire firm is likewise disqualified unless it establishes the Rule 1.12 screening procedure isolating the disqualified lawyer from any participation in the matter.

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The underlying policy considerations of Rules 1.11 and 1.12 are “the treachery of switching sides; the safeguarding of confidential information from future use against the government; the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment...; and the professional benefit derived from avoiding the appearance of evil.” *A.B.A. Informal Op. 342 (1975)*.

Thus, when a government attorney, judge, or other adjudicative officer (arbitrator, mediator, or other third-party neutral) enters or returns to private practice, absent consent of the parties involved, he or she shall not accept private employment in a matter in which he or she had substantial responsibility while a public employee. *Rules 1.11 and 1.12*.

Note that a lawyer’s work on a general statute, regulation, or general government policy (not specifically applicable to a particular person) is not deemed work on a “matter.” *Rule 1.11(e)*; *Restatement (Third) of the Law Governing Lawyers § 133 cmt. e (2000)*; *Rule 1.11 annot. (2015)*.

b. Public Employees Who Are Lawyers - Conflicts With Official Duties

A lawyer who is a public officer, whether full or part-time, may not engage in activities in which his personal or professional interests are, or foreseeably may be, in conflict with his official duties. Indeed, Congress has enacted a criminal statute prohibiting all government employees (including lawyers) who leave government service from working for private clients on matters in which they were “personally and substantially” involved while employed by the federal government. *18 U.S.C. § 207(a)*.

The Rules further state that a lawyer who assumes a public office shall not permit his or her name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he or she is not actively and regularly practicing law as a member of the firm. *Rule 7.5(c)*.

EXAMPLE:

In 2017, the well-known New York law firm Kasowitz, Benson, et al. had to revise its name when name partner David Friedman was named by President Trump as ambassador to Israel.

An attorney who, by virtue of holding a public position, could secure a favorable settlement for a private client, should disqualify himself or herself because of the potential for abuse of public office, as well as the very appearance of impropriety.

Mandatory termination of representation by a lawyer-legislator should occur when the legislator’s public responsibilities will, or are likely to, adversely affect his [or her] independent professional judgment on behalf of the client. A lawyer-legislator shall not use his [or her] public position to obtain special advantage in legislative matters for himself [or herself] or for a client when he [or she] knows, or it is obvious, such actions are not in the public interest. *Maine Op. 28 (1982)*.

[The] subject of land development is one in which the likelihood of transactions with a municipality and the room for public misunderstanding are so great that a member of the bar should not represent a developer operating in a municipality in

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which the member of the bar is the municipal attorney or the holder of any other municipal office of apparent influence.

In re A. and B., 44 N.J. 331, 333 (1965). Thus, the simultaneous representation by an attorney of a municipality (as either a public official or counsel) and a land developer operating within that municipality is ethically forbidden.

6. Conflicts of a Former Judge, Mediator or Former Neutral Arbitrator

When a judge or arbitrator leaves the bench and resumes the practice of law, there are two principal activities that must be avoided:

1. Discontinue the use of the title “Judge.” The former judge should not refer to herself or himself as “Judge” (such as on stationery or when submitting court papers), and shall not have others refer to her or him as “Your Honor” or “Judge” (such as having the phone answered with “Judge Smith’s office”). *A.B.A. Formal Op. 95-391*. Also, a lawyer shall not implicitly or explicitly indicate that the lawyer is capable of improperly influencing a tribunal or achieving results that violate the Rules or other law. *Rule 8.4(e)*.
2. Becoming involved in a matter that the judge, mediator, or neutral arbitrator was personally and substantially involved in as a judge or neutral arbitrator without the consent of both sides. *Rule 1.12*. Note that the former judge is not prohibited from being involved in a matter in which the former judge did not participate or where the judge had previously exercised only remote or incidental administrative responsibility which did not affect the merits of the matter.

If the former judge or arbitrator was substantially and personally involved in a matter, when that lawyer resumes private practice and both sides do not agree to the lawyer participating in the matter, both the lawyer and lawyer’s law firm are disqualified, unless:

- a. the lawyer is screened from any participation in the matter; and
- b. written notice is given to the tribunal to enable it to insure that proper screening takes place. *Rules 1.11 and 1.12*.

Note, that an attorney selected as a partisan arbitrator by one of the parties to the arbitration agreement who then sits on a partisan arbitration panel, is not prohibited from subsequently representing that party. *Rule 1.12 (d)*; Rotunda, *Professional Responsibility* § 1.12-1(b) at 608 (2015-2016 ed.); *Annotated Model Rules 1.12*, p. 226 (8th ed. 2015).

For example, where each contracting party can select a partisan arbitrator, and the two partisan arbitrators then select a third arbitrator, then after the arbitration award, an attorney, who was a partisan arbitrator, who is considered the client’s advocate, and not a neutral arbitrator, can represent the client in enforcing the arbitrator award.

7. Short-Term Nonprofit Legal Service Programs

Lawyers are encouraged to participate in legal service programs designed to provide free legal advice to the public at large. Under Rule 6.5, where courts, bar associations or nonprofit organizations establish programs for lawyers to give quick legal advice with no expectation of further representation, participating lawyers must first secure the informed consent of the client to such limited representation. Since it is not feasible to screen such clients for a conflict of interest with the lawyer's present or former clients, Rule 1.7 (current client) and Rule 1.9(a) (conflict with a former client) do not apply unless the lawyer *knows* that the representation presents a conflict of interest for the lawyer or knows that another member of the lawyer's firm would be disqualified. *Rules 1.10 and 6.5.*

If, after commencing the short-term representation, the lawyer undertakes to represent the client on an ongoing basis, then the representation is no longer quick. Thus, Rules 1.7, 1.9(a) and 1.10 do apply.

8. Screening Procedures to Avoid Imputed Disqualification

To avoid imputing the disqualifications of the migrating lawyer to the colleagues in the new firm, adequate screening measures, including restrictions on access to electronically stored information, must be adopted in the lawyer's new firm to eliminate any participation by the migrating lawyer in the representation and written notice of the screening procedures given to the migrating lawyer's former clients. *Rule 1.10 and 1.11(b).* The former government lawyer should acknowledge the screening obligation and not communicate with any other lawyer in the firm concerning the matter. Likewise, the lawyers in the firm working on the matter should be advised of the screen and not communicate with the disqualified lawyer on the matter.

Screening may be inadequate in the context of a relatively small (e.g., 35 attorneys) firm. *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980); *Crudele v. N.Y.C. Police Dep't.*, 2001 U.S. Dist. LEXIS 13779, **13-14 (S.D.N.Y. Sept. 6, 2001); *Kassis v. Teacher's Insurance & Annuity Ass'n.*, 93 N.Y.2d 611 (1999).

The A.B.A. now allows the use of confidentiality screens, also known as an ethics wall, to:

1. Government lawyers moving into private practice, *Rule 1.11*;
2. Former judges, arbitrators, mediators, or other third-party neutrals, *Rule 1.12*;
3. When lawyers in private practice move laterally from one firm to another firm nonconsensual screening is permitted to avoid an imputation conflict with the lawyer's new firm. Notice, however, must be given to the former client. *Rule 1.10 (a)(2) (2009)*. Even prior to this 2009 amendment, states, including New Jersey, authorized this type of screen for lateral hires to prevent imputing the disqualification to other lawyers in the new firm. *22 Geo J. Legal Ethics 1211 (2009)*.

EXAMPLE:

Attorney Alpha works for law firm M and has worked personally and substantially on client X's matter. Law firm O is the opposing counsel

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representing client Y in the X v. Y matter. Rule 1.10 now allows Attorney Alpha, without client X's consent, to move to law firm O, provided Attorney Alpha is timely screened in law firm O from any participation in the X v. Y matter.

Note, that if a conflict of interest arises within a firm, and the attorney with the conflict has not laterally moved to the firm, then the screening procedure is not available, and the lawyer and entire firm are disqualified.

4. Lawyers who have preliminary discussions with a prospective client, even though no client-lawyer relationship was formed, and who tried to minimize the prospective client's disclosures, but received information from the prospective client that could be significantly harmful to that person, *Rule 1.18*.
5. Non-lawyers, secretaries, paralegals, or law students who worked on a matter before being admitted to the bar, *Rule 1.10 cmt. 3 and 4; Restatement (Third) of the Law Governing Lawyers § 123 cmt. f (2000)*.

G. INFLUENCE BY NON-CLIENTS

Under Rules 1.8(f) and 5.4(c), a lawyer may accept compensation from a third person when:

1. There is full disclosure to the client and the client gives informed consent;
2. The payment and its terms will not interfere with the lawyer's judgment or the lawyer's duty of undivided loyalty to the client; and
3. The client's right to confidentiality remains protected, i.e., nothing can be disclosed to the third person paying the fee without the client's informed consent. *See also, supra, Chapter II.E. 5.*

Ethically, the attorney should be leery of the payment of a fee by a third party, especially in criminal matters where the third party is the prime operator of a criminal enterprise. Such a situation may very well give rise to a claim against the attorney of divided loyalties because the attorney's conduct can be construed as that of one acting as the agent of the payor of the fee rather than of one acting primarily for the client.

EXAMPLE:

Where the arrested employee of a pornography store was represented by an attorney retained and paid for by the store's owner, it was held to be a violation of the employee's Sixth Amendment right to the effective assistance of counsel. The lawyer may "prevent his client from obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer's interest." *Wood v. Georgia, 450 U.S. 261, 269 (1981)*.

A person or organization (e.g., liability insurance company or employer) paying for or furnishing lawyers to represent others, possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Such persons or organizations may be interested in furthering their own economic, political, or social goals without regard to the professional

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responsibility of the lawyer to the lawyer's individual client. Others may be far more concerned with establishment or extension of legal principles than with the immediate protection of the rights of the lawyer's individual client. Since a lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his or her professional freedom.

In representing a client, the lawyer's conduct may be directed by someone other than the client if the client consents and the direction is reasonable in scope. For example, when a lawyer is chosen and paid for by a liability insurance company to defend an insured defendant being sued (automobile accidents, slip and fall cases, or malpractice cases), the insured is the client. *See also, supra, Chapter II.E. 5.* The attorney can, however, receive direction from and report on the progress of the case to the insurance company, since that is usually provided for in a duty of cooperation clause in the underlying insurance policy. A liability insurance policy (e.g., covering the insured's malpractice) frequently expressly gives the insurer the power to settle without the insured's consent. *Feliberty v. Damon, 72 N.Y.2d 112 (1988).*

An attorney selected or employed by an insurance company can represent the insured as long as the insured and insurer are united in interest. However, if there develops a conflict of interest so that the insurance company would benefit from the ultimate development of facts which would place the insured beyond the coverage, the insurance company's attorney should decline to represent the insured, and should strongly counsel the insurance company to allow, and pay for, a lawyer of the insured's choosing. *See Public Service Mut. Ins. v. Goldfarb, 53 N.Y.2d 392 (1981); Restatement (Third) of the Law Governing Lawyers § 134 cmt. f (2000).* When a conflict of interest between the insured and the insurance company arises, the duty of loyalty is owed by the attorney to the insured-client (e.g., a question arises as to claims exceeding the policy limits and whether to settle within the policy limits, or an issue arises concerning confidential information involving whether the insured's claim is within the scope of coverage under the policy).

EXAMPLE:

A lawyer was retained by an insurer to represent an employer and employee. In a discussion with the employee-client, the lawyer learned that the employee-client was not entitled to coverage under the policy. Because the lawyer must preserve the confidences of the client, the attorney may not disclose these pertinent facts to the employer or the insurer without the employee-client's informed consent after full disclosure of the consequences of such revelations. *A.B.A. Informal Op. 1476 (1981).*

EXAMPLE:

Attorney Alpha was frequently retained by Casualty Insurance Company to defend its insured from liability claims by third persons. The claims against the insured asserted two causes of action: (1) intentional tort (battery) and (2) negligent conduct. The insurance policy only provided coverage to the insured for negligent conduct and not for intentional torts. The insurance company sent the insured a letter reserving its right to disclaim if it later was determined that the insured's conduct was intentional. It then instructed Attorney Alpha to make a motion to dismiss the plaintiff's negligence claim, but not to seek a dismissal of the plaintiff's intentional tort claim.

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Attorney Alpha may not properly proceed as instructed, because to do so is contrary to the insured's interest.

Similarly, if Attorney Alpha "obtains an admission from the insured or discovers other evidence that clearly indicates a lack of coverage, the lawyer must withdraw from further representation of the insured" and not disclose this information to the insurance company because it is a confidence or secret of the insured that must be protected. C. Wolfram, *Modern Legal Ethics* 431 (1986).

H. IMPUTED DISQUALIFICATION

1. Generally

Confidential information obtained by one member of a law firm may properly be shared and known by all members of the firm. However, a lawyer who could properly handle a matter may be imputedly or vicariously disqualified from representing a client if he or she is a partner, "of counsel," or an associate with a lawyer who is barred from representation because of a conflict of interest. The purpose of the rules concerning imputed disqualification is to prevent circumvention of a conflict disqualification by the use of partners or associates.

It stands to reason that, if a lawyer cannot represent two clients with conflicting interests, a lawyer cannot avoid the dilemma by having another lawyer in the lawyer's law firm handle one of the conflicting interests while the lawyer handles the other. The conflict with a present client is imputed to all attorneys affiliated with the lawyer's firm, e.g., associates, attorneys "of counsel" and partners.

For purposes of disqualification, the term "firm" may include lawyers who share office space and occasionally consult or assist each other without undertaking adequate measures to protect confidential information or who hold themselves out to the public in a manner that suggests they are a firm. *Rule 1.0(c) cmt. 2*.

Rules 1.8(k) and 1.10(a) provide that all lawyers presently associated with a firm are subject to imputed disqualification if anyone in the law firm could not represent the client in the following situations:

1. Where there is a conflict of interest with a present client, (*Rule 1.7*);
2. Where the client seeks assistance in making a gift or bequest to another lawyer in the firm, (*Rule 1.8(c)*); or
3. Where the representation creates a conflict of interest with a former client, (*Rule 1.9*).

2. Exception to Firm Disqualification

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them, if practicing alone, would be prohibited from doing so due to a conflict with a present or former client. *Rule 1.10(a)*.

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If, however, the disqualification is based on personal beliefs or interests of one firm member which do not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, there is no vicarious firm disqualification. *Rule 1.10(a)*.

EXAMPLE:

Where Attorney Alpha, a member of a law firm, could not effectively represent Client X because of Alpha's strong political beliefs, Alpha's firm could represent Client X, because neither questions of client loyalty nor of protecting confidential information are present. *Rule 1.10 cmt. 3*. Likewise, a lawyer having sex with a law firm client does not vicariously disqualify other members of the firm from representing that client. *Rule 1.8 (j) and (k)*.

There is no vicarious disqualification of a law firm where the person prohibited from involvement in a client's matter is a non-lawyer, such as a paralegal or secretary. Likewise, a firm is not vicariously disqualified if a lawyer is prohibited from representing a client due to activities that occurred before that person became a lawyer, e.g., work that person did while a law student employed by a different law firm. Screening of such persons, however, still is required. *Rule 1.10 cmt. 4*.

3. When a Lawyer Changes Firms (See also Chapter I-J, Supra)

Rule 1.9(a) prohibits a lawyer from switching sides in a matter. "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which [the new client's] interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." *Rule 1.9(a)*.

When a lawyer changes law firms, neither the lawyer nor the new firm is imputedly disqualified unless:

1. that lawyer directly worked on that matter in the old firm, and
2. that lawyer acquired some confidential material information protected by Rule 1.6. *A.B.A. Formal Op. 94-400; A.B.A. Informal Op. 88-1625*; and
3. the new law firm does not timely screen the lawyer from any further participation in the matter. *Rule 1.10*.

Thus, the lawyer's new firm is not disqualified by imputation if that lawyer did not work at all on the matter or worked only on legal issues, obtained no confidential information, or a screening procedure is timely implemented, and will not work on the matter in the new firm.

When an attorney leaves public employment or public office, another firm member may represent a client in a matter in which the former public official personally and substantially participated in, provided the disqualified member is screened from participation and fee sharing relating to the case. *A.B.A. Informal Op. 342 (1975); Rule 1.11*. See generally, *supra*, this Chapter at *F.4.a*.

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EXAMPLE:

Attorney Alpha recently joined a prosecutor's office. While in private practice working for Attorney Bravo, a sole practitioner, Alpha represented Defendant at the arraignment, grand jury, and suppression hearings. It is clear that Alpha, now representing the prosecution, cannot switch sides and prosecute Defendant. If the prosecutor's office is small and matters are freely discussed among prosecutors and access to all files is unrestricted, then, if the law permits, outside counsel must be appointed to avoid Alpha's conflict of interest and its imputation to the prosecutor's office. Otherwise, if a special prosecutor cannot be appointed, Alpha must be screened from any involvement with Defendant's prosecution to avoid the imputation of the conflict of interest to the entire office. *Restatement (Third) of the Law Governing Lawyers* § 123 cmt. d(iii) (2000).

Keep in mind that an imputed disqualification may be waived by the client. Thus, while Defendant could withhold consent to allow Attorney Alpha to directly conduct the representation, Defendant could waive the imputed disqualification to Alpha's office, thereby permitting another lawyer in that office to conduct the prosecution.

Likewise, when a lawyer leaves a firm and takes the client to a new firm, the old firm is not disqualified from subsequently representing another person with interests materially adverse to the former firm's client, unless the matter is the same or substantially related and all lawyers remaining in the law firm possesses confidential information relevant to the former client's matter. *Rule 1.10(b)*. Again, this conflict may be waived by the affected former client. *Rule 1.10(b)*.

When a lawyer consults with another lawyer who is an expert in a particular area (e.g., a law school professor who is an expert on civil procedure), the expert is deemed to be a separate sole practitioner.

EXAMPLE:

Attorney Alpha representing the plaintiff in the lawsuit *Plaintiff v. Defendant* consults with Professor Expert on the matter. Thereafter, Attorney Bravo, who represents Defendant, consults Professor Expert on another unrelated matter (Professor clearly would have a conflict if Bravo consulted him on the same Plaintiff v. Defendant suit). There is no imputed conflict of interest for either Alpha or Bravo's law firm or for Professor. *Restatement of Lawyering* § 203, *Illustration 3*.

4. Lawyer-Relatives as Adversaries

The Rules prohibit a lawyer from representing clients directly adverse to another who is represented by that lawyer's parent, child, sibling and spouse except upon informed consent by the client after consultation regarding the relationship. *Rule 1.7(a)(2) cmt. 11*. The lawyer-relative's law firm is not, however, imputedly disqualified. *Rule 1.10*.

EXAMPLE:

Alpha represents Client in a civil suit against defendant Bravo. If Alpha's daughter, Delia, is a lawyer, Delia may not represent defendant Bravo without consent of both

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affected clients. However, someone in Delia's law firm could properly represent defendant Bravo because, even though lawyers who are related are disqualified from directly opposing each other in a matter, such a conflict is not imputed to other lawyers in their firms. *Restatement (Third) of the Law Governing Lawyers* § 123 cmt. g (2000). As of 2016, thirty-three states have adopted Rule 1.10(a)(2). *See 85 USLW* 578 (11-3-16).

A lawyer should disclose to a client the nature of any relationship with opposing counsel if there exists a potential for conflict. Rule 1.8(I) requires the client's consent when opposing counsel in different firms are closely related by blood or marriage (e.g., spouse, parent, child or sibling). *Id.*

I. GIFTS FROM CLIENTS

A lawyer may accept a gift from a client (e.g., given at a holiday or in appreciation for the lawyer's efforts for the client). However, in order for the lawyer to avoid the appearance of impropriety, overreaching and undue influence, the Rules flatly prohibit a lawyer or a member of the lawyer's firm from *soliciting* (a verbal request) a substantial gift or drafting or overseeing the execution of an instrument (e.g., a will, deed or trust) that gives the lawyer or any member of the lawyer's immediate family a "substantial gift" (as compared to a "token" gift). The law treats a gift or bequest by a client as presumptively the product of fraud and undue influence and the lawyer has the burden of proving it was not. Courts look at the gift very carefully where the client was elderly and may have been more susceptible to undue influence by the lawyer-donee. The potential for the lawyer's conflict of self-interest is so great in this area that the Rules provide no provision for informed consent of the client.

The one exception arises when the client is related to the lawyer -- for example, where a lawyer draws a will for his or her spouse or parent and the will includes a bequest to the lawyer. *Restatement (Third) of the Law Governing Lawyers* section 127 further provides that the gift or bequest from a family member should not be significantly disproportionate to those given to other donee's similarly related to the donor.

EXAMPLE:

Attorney Alpha, one of four children, prepared his widowed mother's will. When his mother died four years later, the will was probated. It divided the mother's estate into four equal parts for each of her four children, including Alpha. Such a gift to Alpha raises no suspicion. However, if the mother left everything to Alpha, Alpha would be required to persuade the Surrogate that he did not overreach or exert undue influence in preparing the will.

Note that Rule 1.8(c) does not prevent a lawyer from seeking to be named as a trustee or as an executor in the client's will. However, the lawyer should advise the client of the extent of the lawyer's financial gain from such an appointment as well as the availability of alternate candidates for the position. *Rule 1.8 cmt. 8.*

"Because a fiduciary performs services for compensation, accepting appointment as a fiduciary is not accepting a gift from a client who is unrelated to the lawyer" In addition, because appointing a fiduciary is not a 'business transaction with a client,' Rule 1.8(a) does not apply to require the client to give her signed informed consent" *A.B.A. Formal Op. 02-426 (2002).*

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Note that in such a situation the lawyer may appoint herself or someone in her firm to perform the estate's legal services, since "the lawyer so appointed represents only himself as fiduciary and not the trust or estate as an entity or its beneficiaries...." *Id.*

The A.B.A.'s opinion concludes that when a lawyer serves as a fiduciary, she cannot simultaneously represent either a creditor of the estate or an estate beneficiary since the conflict of interest would be materially limiting. "Moreover, the representation of the beneficiary or creditor would not be permissible even with the consent of the client, because it would be unreasonable for the lawyer to conclude that he could provide competent and diligent representation when opposing the interest of an estate or trust for which he is a fiduciary." *Id.*

J. CLIENT'S INFORMED CONSENT

A client's informed consent to legal representation notwithstanding a conflict of interest may, in many situations, cure the conflict. Consent to a conflict of interest requires that each affected former, existing, or new client give informed consent based on the full disclosure by the attorney of the possible adverse effects. A properly informed client can waive attorney conflicts of interest after consultation (*Rules 1.7, 1.8, 1.9, 1.10, 1.12*). The client's waiver of the conflict of interest must be confirmed in writing (e.g., sending the client a letter confirming the waiver). The client does not have to sign it. Under Rule 1.7, the test also requires that the lawyer reasonably believe that he or she will be able to provide competent and diligent representation to each affected client. *Rule 1.7(b)(1)*.

There are numerous sections of the Rules permitting the cure of potential conflict or other violation where the client has given informed consent after consultation and disclosure:

1. Consent to a lawyer's receiving fees from a third person. *Rules 1.7(b)(2) and 1.8(f)(1)*.
2. Consent to a lawyer's sharing legal fees with another lawyer. *Rule 1.5(e)(2)*.
3. Consent to disclosure of confidential information. *Rule 1.6(a)*.
4. Consent to a lawyer's personal, proprietary or pecuniary interest that may conflict with the lawyer's judgment. *Rule 1.8(a)(3) and (b)*.
5. Consent to representation of multiple clients. *Rules 1.7(b)(4) and 2.2*.
6. Consent to a joint business venture between a client and attorney. *Rule 1.8(a)*.
7. Consent for a conflict involving a former government lawyer. *Rule 1.11(a)(2)*.
8. Consent to the settlement of civil or criminal claims of multiple clients. *Rule 1.8(g)*.

Thus, a lawyer may accept new employment that conflicts with the interests of a current client if the clients give informed consent after full disclosure and the lawyer reasonably believes the representation will not adversely affect the existing client. *Rule 1.7(b)*. Mere knowledge by the existing client of the lawyer's representation of the other client is not "full disclosure." For example, where a lawyer simply sends a retainer letter stating that the representation may create a potential for a conflict of interest, disclosure is insufficient. There instead must be an explanation

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of the possibility of disclosure and access to confidential information because of the conflict, and of the client's vulnerability and the possible adverse effects of the new representation, including the effect of the conflict on the exercise of the lawyer's independent professional judgment on behalf of each client. *A.B.A. Informal Op. 1495 (1982)*.

Consent must be a knowing, informed decision based on sufficient specific facts supplied by the lawyer to enable the client to make an informed decision. The consultation preceding the client's consent must fully advise the client of the potential risks and problems of the representation and the reasons why it may be desirable to retain separate counsel without conflict. The rules require that a lawyer explain matters sufficiently so that each client can make an informed decision on the representation. *Rule 1.0(e) and Rule 1.4(b)*.

A consenting client may unilaterally have a change of heart and withdraw the informed consent for a good reason, bad reason, or no reason at all. Clearly, where circumstances have changed since consent was initially given (e.g., divergent interests have now arisen between the co-clients), a client may withdraw the initial consent and the lawyer must cease representing either co-client.

EXAMPLE:

Alpha agreed to represent clients A & B in purchasing and running a restaurant. Both consented to allow Alpha to represent them. Thereafter Client A reasonably concluded that Alpha was habitually favoring the interest of Client B. Client A may withdraw consent to the dual representation. Alpha must then withdraw from further representing either A or B. *Rule 1.7 cmt. 21*.

Even with fully informed client consent, Restatement (Third) of the Law Governing Lawyers section 122 prohibits dual representation:

1. When prohibited by law;
2. When one co-client asserts a claim against another co-client in the same litigation in which one attorney or a member of the attorney's firm is representing both; or
3. When it is not likely that the lawyer can provide adequate representation to one or more clients.

EXAMPLE:

Attorney Alpha represented as joint clients several family members and their restaurant corporation on matters involving the family business. Alpha may not later represent just one family member in a suit against the others. *Brennan's Inc. v. Brennan's Restaurants Inc., 590 F.2d 168 (5th Cir. 1979)*.

K. CONSENT TO FUTURE CONFLICTS

The commentary to Rule 1.7 permits a client to consent to conflicts that may arise in the future. *Rule 1.7 cmt. 22*. The efficacy of such consent is dependent upon how well the client "reasonably understands the material risks that the waiver entails." *Id.* Thus, an open-ended waiver of "any and all conflicts of interest that may hereafter arise" probably is not effective since it was not

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“exceedingly explicit.” *Id.*; *A.B.A. Formal Op. 05-436 (2005)*. However, a waiver is effective where the client is “an experienced user of the legal services” and is “reasonably informed regarding the risk that a conflict may arise,” especially if the client is independently represented by counsel and the consent is limited to future conflicts unrelated to the subject of the representation. *Id.*; *Restatement (Third) of the Law Governing Lawyers § 122 cmt. D (2000)*; *see also, supra, Consents from Prospective Clients, this Chapter at F.2.*

L. CONFLICT REMEDIES

When the lawyer recognizes a conflict of interest prior to undertaking legal employment, the lawyer has three basic options:

1. Decline the employment;
2. Limit the scope and objective of the legal employment to avoid the conflict (*Rule 1.2(c)*); or
3. Fully inform the client, obtain the client’s consent to the representation and confirm the waiver in writing.

If the conflict of interest becomes apparent only after undertaking legal representation, the lawyer has two options:

1. Withdraw from further representation of all clients involved in the matter, or
2. After fully informing the clients involved, obtaining the clients’ written consent to the representation.

Rule 1.7 requires a lawyer to implement reasonable procedures to assist the lawyer in detecting conflicts either in litigation or non-litigation matters. *Rule 1.7 cmt. 3*; *see also Rule 1.18 (Duties to Prospective Clients)*.

M. CONFLICT SANCTIONS

If a lawyer undertakes to represent a client despite the existence of a conflict of interest and the lawyer should not have done so, the following sanctions may be imposed upon the lawyer:

1. Removal from further representation in the matter (frequently utilized);
2. Fee forfeiture by the lawyer for undertaking the legal representation in the face of an obvious conflict of interest;
3. A legal malpractice claim if the represented client is injured as a result of the conflict of interest;
4. Professional discipline (e.g., disbarment, sanction, censure); and/or
5. Court-imposed sanctions on the lawyer for undertaking the matter in light of the obvious conflict of interest.

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When a lawyer must withdraw from a case, and at the outset it was apparent or discoverable through diligent inquiry that the attorney should not have undertaken the matter, that attorney forfeits the right to seek a fee. Thus, if an attorney undertakes a case knowing before the commencement of the action that he would be a key witness, courts have found that the lawyer is not entitled to any compensation for services rendered. *Brill v. Friends World College*, 133 A.D.2d 729 (2d Dep't 1987); *Quinn v. Walsh*, 18 A.D.3d 638 (2d Dep't 2005).

The sanction of denying fees to attorneys who represent conflicting interests is perhaps more effective than any of the other sanctions usually imposed. Certainly a lawyer will be forced to weigh carefully whether or not he [or she] should accept a [matter] if there is a possibility that he [or she] will not be paid for the work that he performed.

Note, Sanctions for Attorneys Representing Conflicting Interests, 57 Columbia L. Rev. 994, 1003-04 (1957).

CHAPTER V

COMPETENCE, LEGAL MALPRACTICE, AND OTHER CIVIL LIABILITY

A. INTRODUCTION

The MPRE poses questions on the circumstances that give rise to legal malpractice, the scope of a lawyer's liability for failing to exercise due care in the practice of law, and the standard of care and competence a lawyer must exercise in order to avoid civil liability.

B. EXERCISING DILIGENCE AND DUE CARE

1. Generally

The standard of care a lawyer owes to his or her client is to possess and exercise the skill, prudence, and diligence that other lawyers of ordinary skill and capacity commonly possess and exercise in the performance of legal tasks.

A lawyer is expected to possess the same knowledge of elementary principles of law that are commonly known by reasonably prudent, well-informed attorneys. All attorneys are expected to discover additional rules of law which, although not commonly known, may readily be found through standard research techniques. Additionally, all attorneys must comply with their continuing legal education requirements, if any. *Rule 1.1 cmt. 6*. Lawyers must stay abreast of changes in the law, including the benefits and risks associated with technology.

If the law on a particular issue is unsettled or debatable, an attorney will not be held responsible for failing to anticipate the ultimate outcome. But even with respect to an unsettled area of the law, an attorney must undertake reasonable research in order to understand the relevant legal principles and to make informed decisions on a course of conduct based upon an intelligent assessment of the problem. *Att'y Disciplinary Bd. V. Wright*, 840 N.W.2d 295 (Iowa 2013). An attorney's unwillingness or inability to become educated on the applicable principles of law may constitute malpractice.

2. Statewide Standard of Care

In determining whether a lawyer has committed malpractice, juries will generally be provided with the standard of care in the state. "The narrower 'locality test,' under which the standards of a local community govern, has seldom been recognized for lawyers." *Restatement (Second) Torts § 299A cmt. g*. Some commentators note that "[i]n many areas of practice a national standard seems entirely appropriate" because lawyer regulation, legal education, and certain practice areas are nationally oriented. *Dan B. Dobbs, The Law of Torts §720, Vol. 4, p.12 (2d ed. 2011), citing Restatement (Third) of the Law Governing Lawyers § 52 cmt. b*.

C. COMPETENT REPRESENTATION

The Rules define competent representation as a combination of general expertise and diligent preparation for the specific task at hand. The Rules require lawyers to possess “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” *Rule 1.1*. Competence also refers to becoming familiar with changes in “communications and other relevant technologies.” *Rule 1.1* cmt. [1].

“Clients can waive many rights, but the ethics rules do not permit the client to waive the lawyer’s duty of competence.” *Ronald D. Rotunda, Legal Ethics § 1.1-2(a) at 96 (2015-2016 ed.)*. The first sentence of Rule 1.1 states “[a] lawyer shall provide competent representation to a client.” Thus, the Rules explicitly limit a lawyer’s ability to prospectively avoid malpractice liability. *See Rule 1.8(h)(1)*.

The lawyer’s lack of competence is not excused by the lawyer’s heavy case load, inexperience, or negligent office personnel. A newly admitted attorney is held to the same competence standard as an experienced veteran, although inexperience can be a mitigating factor in the disciplinary sanction imposed. *In re Martin*, 982 So. 2d 765 (La. 2008); *Lewis v. State Bar*, 28 Cal. 3d 683 (1981). In fact, the Rules suggest that a newly admitted attorney who is not competent to handle a legal matter should associate with a competent attorney while handling the case. *Rule 1.1* cmt. 2.

The Sixth and Fourteenth Amendments guarantee the right to effective assistance of counsel to all criminal defendants who face possible incarceration. After conviction, however, criminal defendants who seek a new trial on the basis of the ineffectiveness of defense counsel have a heavy burden. Specifically, they must demonstrate that:

1. Defense counsel’s conduct fell below established professional norms, e.g., counsel was drunk, sleeping, or failed to conduct an investigation, cross-examine witnesses, object to evidence, or call necessary lay or expert witnesses at trial. *Elizabeth Connelly, Current Development 2004-2005: The Striking Similarities Between the Business Judgment Doctrine and the Strickland Test*, 18 *Geo. J. Legal Ethics* 669, 672 n. 31, 32 (2005); and
2. But for the attorney’s incompetence, the result in the criminal case would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Currently, courts are directed to look at whether the attorney’s sub-par performance rendered the proceeding fundamentally unfair or unreliable. *See Lockhart v. Fretwell*, 506 U.S. 365 (1993). Prejudice is shown if, but for the attorney’s deficient performance, there is a “reasonable probability” that the outcome would have been different. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). “In practice . . . almost nothing short of proof of innocence will merit a reversal of conviction, however unfairly obtained. *Dennis E. Curtis and Judith Resnik, Colloquium: What Does it Mean to Practice Law “in the Interests of Justice” in the Twenty-First Century?: Grieving Criminal Defense Lawyers*, 70 *Fordham Rev.* 1615, 1619 (2002).

Diligence under the Rules is coupled with reasonable promptness in representing the client. *Rule 1.3*. The lawyer must regulate his or her caseload and workload to ensure that no matter is neglected or unreasonably delayed. A lawyer’s failure to timely commence a lawsuit, respond to pleadings, interrogatories, or a demand for interlocutory papers, appear in a suit, or file an appeal constitutes neglectful conduct. However, a lawyer’s duty to act with reasonable promptness and

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diligence does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice his or her client. *Rule 1.3 cmt. 3.*

EXAMPLE:

What should a public defender representing indigent criminal defendants do when she realizes that she has undertaken too much work? Since Rule 1.1 requires lawyers to provide competent representation, the lawyer must not accept new clients. If necessary, she should reduce her workload by assigning cases to others within her office. If clients are being assigned through a court appointed system, she should request that she not be assigned any new cases by the court until her workload becomes more manageable. As a last resort, if she is unable to competently represent any client, she should move to withdraw as counsel from a sufficient number of cases. *A.B.A. Formal Op. 06-441 (2006).*

Lawyers are required to maintain their requisite knowledge and skill by keeping “abreast of changes in the law and its practice, engag[ing] in continuing study and education and comply[ing] with all continuing legal education requirements to which the lawyer is subject.” *Rule 1.1 cmt. 6.*

A lawyer must be able to determine when a case requires “specialized knowledge or experience” the lawyer does not possess, and to competently represent a client, that lawyer must gain experience, consult a specialist, or decline to represent the client in that matter. *In re Fisher, 202 P.3d 1186 (Colo. 2009).*

“A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience A lawyer can provide adequate representation in a wholly novel field through necessary study.” *Rule 1.1 cmt. 2.* An attorney may ethically accept employment involving an unfamiliar area of the law if the attorney reasonably expects to become qualified in the subject matter of the employment through study, attendance at legal education courses, etc., as long as the attorney’s preparation does not result in unreasonable delay or expense to the client. Likewise, an attorney may accept employment in an unfamiliar area provided, with full disclosure to and consent of the client, the attorney associates with a lawyer who is competent in that matter. *See Rule 1.1.*

In order to comply with ethical obligations under the Rules, a lawyer may obtain confidential legal advice from outside her firm and without consulting with the client. *See Rule 1.6(b)(4).* Unless there is an agreement between the attorneys that the lawyer being consulted will not undertake representation adverse to the client, the lawyer seeking advice should speak hypothetically and without identifying the client. Note that where the advice is sought on a hypothetical basis, the attorney who was consulted has no duty of confidentiality (*Rule 1.6*) and no conflict of interest (*Rule 1.7*), and would be able to undertake such representation adverse to the client’s interest. *A.B.A. Formal Op. 98-114 (1998).*

A partner or supervising lawyer must make reasonable efforts to ensure that all lawyers in the firm are competent and prepared. *Rule 5.1.* Rule 1.1 compels firms to establish minimum standards for each of their areas of practice. To meet these standards, firms shall provide adequate training, supervision, and peer review programs. *Rule 5.1 annot. (2015).* Thus, if an unsupervised paralegal neglects a client’s matter, the supervising lawyer is ethically responsible. *See Rule 5.3; In re*

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Martin, 699 S.E.2d 695 (S.C. 2010) (lawyer violated Rule 1.1 by failing to timely file documents despite delegating the task to nonlawyer staff). Notably, responsibility does not arise under respondeat superior. “If a supervisor knows that a subordinate’s workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, under Rule 5.1(c) the supervisor is responsible for the subordinate’s violation of the Rules of Professional Conduct.” *A.B.A. Formal Op. 06-441* (2006).

To prevent neglect of a client’s matter in the event of a solo practitioner’s death or disability (e.g., stroke or senility), the duty of diligence may require that each solo practitioner prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer’s death or disability, and determine whether there is need for immediate protective action. *Rule 1.3 cmt. 5*.

If an administrative or judicial proceeding results in a determination that is adverse to the client (e.g., a loss on some or all issues), the lawyer must consult with the client about the possibility of an appeal before relinquishing responsibility for the matter. *Rule 1.3 cmt. 4; see also Rule 1.4(a)(2)*.

D. DUTY OWED TO A NON-CLIENT

1. General Duties Owed

Generally, a duty of care is owed to:

1. existing clients;
2. prospective clients (*Rule 1.18*);
3. non-clients who reasonably rely on the attorney’s work product or advice and who foreseeably could be injured if the attorney’s work product or advice is negligently supplied;
4. non-clients who the lawyer knows are third party beneficiaries of the attorney-client contract, e.g., a beneficiary in a will; and
5. non-clients harmed by a client’s tortious conduct where the lawyer gave substantial assistance or encouragement to the tortfeasor. *Restatement (Second) Torts § 876(b)*.

A lawyer rarely owes a duty of care to an opposing party in litigation or in a business transaction unless the attorney affirmatively assumes a duty to the non-client.

EXAMPLE:

Plaintiff is injured in an automobile accident as a result of the negligent driving of John Smith. In the subsequent lawsuit, plaintiff’s lawyer, Alpha, negligently serves the wrong John Smith. If the plaintiff suffers damages because of Alpha’s negligence, the plaintiff could assert a claim for legal malpractice and/or breach of fiduciary duty, because Alpha owed client-plaintiff a duty of care. If, however, the wrongly named John Smith incurred expenses in retaining a lawyer to defend against the plaintiff’s claim, John

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Smith could not sue Alpha, because Alpha owed no duty of care to John Smith, a non-client.

EXAMPLE:

At a real estate closing, Alpha, the seller's attorney, agreed to record the deed conveying title to the buyer. If Alpha neglected to record the deed he is liable in negligence to the buyer. Here, even though Alpha is not the buyer's attorney, Alpha is liable because he assumed the duty of recording.

Lawyers can be sued by non-clients who have been injured by fraud, breach of fiduciary duty, or other tortious conduct committed by the lawyer's client if the lawyer aided and abetted (substantially assisted) in the harmful tortious conduct. *Restatement (Second) Torts § 876(b); Reynolds v. Schrock, 197 Or. App. 564 (2005).*

2. Negligent Misrepresentation

The tort of negligent misrepresentation arises when a lawyer in privity with a client breaches a duty to impart accurate information or act with due care. Negligent misrepresentation arises when the lawyer:

1. Fails to exercise reasonable care to ascertain facts; or
2. Fails to possess or apply the skill and competence of the reasonably prudent lawyer.

When a lawyer makes a false statement that the lawyer honestly believed to be true, but speaks without reasonable grounds for such belief, the lawyer may be liable for negligent misrepresentation to those whom the lawyer owes a duty of care, including clients and certain non-clients.

Courts have typically limited the lawyer's duty to those in contractual privity (i.e., clients) or to those who were the "end and aim" of the transaction. It "does not extend to all non-clients, but it extends to those the lawyer was retained to benefit, such as the beneficiary of the will, and also to those who are involved in a transaction with the client and who rely on upon the lawyer's work after the lawyer has invited them to do so. This certainly excludes most non-clients." *Dan B. Dobbs, The Law of Torts §725, Vol. 4, p.38 (2d ed. 2011).*

EXAMPLE:

An attorney who prepares an opinion letter or report to induce a known and identified third party's reliance gives rise to a relationship close enough to privity to allow the third party non-client to sue the lawyer.

About 80% of U.S. jurisdictions (40 states) do not require privity of contract with the lawyer and allow a nonclient to sue for legal malpractice as a third party beneficiary of the lawyer-client contract. *Baker v. Wood, Ris & Hames, P.C., 2016 BL 12847 (Colo. 1-9-16).*

EXAMPLE:

Client, a widower, has three adult sons, none of whom has talked to Client for years. Client retained Alpha, a lawyer, to draft Client's will and leave everything to Friend. Under Alpha's supervision, the will was executed improperly, and as a result, was not admitted to probate. Therefore, when Client died, nothing passed to Friend and all of Client's assets passed to his three sons under the law of intestate succession. Friend has a malpractice claim against Alpha because Client intended that Alpha's services would primarily benefit Friend. Here, since the "end and aim" of the lawyer's services were to benefit Friend, Friend has standing to sue Alpha.

Generally, "New York courts [following the minority position] impose a strict privity requirement to claims of legal malpractice; an attorney is not liable to third parties for negligence in performing services on behalf of his client." *Federal Ins. Co. v. N. Am. Specialty Ins. Co.*, 47 A.D.3d 52, 59 (1st Dep't 2007). New York does allow the decedent's estate's representative (the executor or administrator, but not estate beneficiaries) to sue the decedent's attorney for negligent estate planning that adversely affected the estate's tax liability. *Schneider v. Finmann*, 15 N.Y.3d 306 (2010).

When a lawyer's client is also a fiduciary (trustee of a trust, executor of an estate, or guardian for an incompetent) who acts primarily for the benefit of individuals who are not the lawyer's clients, then the lawyer owes a duty to the fiduciary's beneficiaries (who are non-clients) to prevent or mitigate a known breach of the client's fiduciary duty. Thus, an attorney could be liable for assisting his client-fiduciary in engaging in wrongful self-dealing.

EXAMPLE:

Lawyer drafts documents that enable a client-fiduciary to sell his own property at an inflated price to the trust for which he is acting as fiduciary, or to purchase trust property at an unreasonable discount. Both the sale and purchase are at the expense of the trust. Lawyer would be subject to discipline and also would be liable to the beneficiaries of the trust.

E. LEGAL MALPRACTICE

1. The Elements of a Claim

"[L]egal malpractice action will be brought as negligence actions in tort, as breach of contract action, and/or as breach of fiduciary duty actions." 43 *Hofstra L. Rev.*, 353, 360 (2015).

The following elements must be alleged in a claim for legal malpractice:

1. A duty of care owed to the plaintiff by the lawyer to pursue the client's legal objectives (*Restatement (Third) of the Law Governing Lawyers* § 52);
2. The lawyer's breach of that duty;
3. A causal connection between the lawyer's failure to exercise due care and the plaintiff's pecuniary injury; and

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4. Damages proximately caused by the lawyer's breach of duty.

2. Generally

Malpractice may consist of many different omissions or commissions. These include the failure to file an action within the statute of limitations period, the failure to properly record a document, the improper drafting of an instrument, or the failure to preserve property or documents entrusted to the lawyer for safekeeping. However, if the attorney acts in good faith and with an honest belief that his or her acts and advice are well-founded and in the best interests of the client, the attorney will not be held liable for a mere error in judgment. *In re Watts and Sachs*, 190 U.S. 1 (1903). "An attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment, where the proper course is open to reasonable doubt. Thus selection of one among several reasonable courses of action does not constitute malpractice." *McCord v. Jaspen Schlesinger Hoffman, LLP (in re Monahan Ford Corp. of Flushing)*, 390 B.R. 493 (Bankr. E.D.N.Y. 2008).

EXAMPLE:

Where a lawyer identifies reasonable alternative courses of action (e.g., whether to allow the criminal defendant to testify, whether to have the plaintiff quit or be fired, etc.), and the lawyer selects one alternative with a cogent reason for doing so, she will not have committed malpractice simply because another course of action may have been better. A simple error of judgment does not subject one to discipline or give rise to malpractice liability.

Where there is no evidence of fraud, collusion, personal interest in the advice given to the client, or bad faith, a third-party claim against an attorney for tortious interference with a contract will not succeed against an attorney who erroneously advised a client to breach a contract. *Id.*; *Restatement (Third) of the Law Governing Lawyers* § 52.

While an attorney is not a client's insurer and is not answerable for every mistake or error in professional judgment, the attorney nevertheless contracts to use reasonable knowledge, skill, preparation, and competence in representing the client. *Stewart v. Sbarro*, 362 A.2d 581 (N.J. Super. Ct. App. Div. 1976).

A trier of fact applying the standard may consider such circumstances as time pressures, uncertainty about facts or law, the varying means by which different competent lawyers seek to accomplish the same client goal, and the impossibility that all clients will reach their goals. Such factors are especially prevalent in litigation. They warrant caution in evaluating lawyers' decisions, although they do not warrant the view, still occasionally asserted, that all decisions taken in good faith are exempt from malpractice liability. Expert testimony by those knowledgeable about the legal subject matter in question is relevant in applying the standard.

Restatement (Third) of the Law Governing Lawyers § 52 cmt. b.

3. Duty

To plead a malpractice claim, the plaintiff must allege that the lawyer owed a duty to the plaintiff. By rendering legal services and advice, an attorney impliedly promises to use the skill, competence, diligence, and knowledge ordinarily used by attorneys under similar circumstances, unless the lawyer represents that the lawyer will exercise greater competence or diligence. *Restatement (Third) of the Law Governing Lawyers* § 52.

An attorney who claims to be an expert or specialist in a particular field is held to a higher standard of care with regard to that area of law than is a general practitioner. The expert's conduct under the circumstances will be compared to the skill and knowledge normally possessed and exercised by a legal expert or specialist in that area of the law.

The diligence element of the duty owed by a lawyer's representation requires the lawyer to inquire into facts, analy[ze] [the] law, exercise . . . professional judgment, [and] communicat[e] with the client Even when a lawyer has been inadequately diligent, the lawyer's breach of duty [may not be the proximate cause of the plaintiff's injury]. For example, if without required investigation the lawyer recommended that the client accept a settlement offer that was in fact a good one.

Restatement (Third) of the Law on Lawyers § 52 cmt. c.

4. Breach of Duty

An attorney breaches the duty of due care by failing to exercise the skill commonly exercised by an ordinary member of the legal community.

EXAMPLE:

A real estate attorney who neglects to compare the description of the property in the deed with the survey map breaches the duty of ordinary, normal, and professional care. A plaintiff can establish a breach of duty by offering expert testimony that all attorneys who handle real estate closings correlate the two documents. *See Canavan v. Steenburg*, 170 A.D.2d 858 (3d Dep't 1991).

Some areas of law have been found to be beyond the understanding of ordinary prudent lawyer. For example, the California Supreme Court held that ignorance of the intricacies of the rule against perpetuities was not malpractice. *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961), cert. denied, 368 U.S. 987 (1962). The *Lucas* case is read with delight by both students and practicing attorneys. In essence, the *Lucas* court held that, because attorneys must exercise an ordinary standard of care, and because the ordinary attorney (and law student) is not competent in the area of perpetuities, a lawyer who drafts a will that violates the rule does not commit malpractice. Some years later, the validity of *Lucas* was doubted by the same court. *See Wright v. Williams*, 47 Cal. App.3d 802, 809 n.2 (1975).

A lawyer does not breach his or her duty to a client for undertaking "any action or inaction the lawyer reasonably believed to be required by law, including a professional rule." *Restatement of the Law (Third) Governing Lawyers* § 54(h). Likewise, a lawyer does not commit malpractice by failing to pursue objectives or to take actions that the lawyer reasonably believes are prohibited by

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law, including ethical rules. Thus, a lawyer is not liable for malpractice for disclosing a client's intent to use the lawyer's services to inflict imminent serious personal injury or death or to commit a crime or fraud that is reasonably certain to result in substantial injury to another's financial interests or property.

EXAMPLE:

Attorney Alpha ardently opposed pretrial discovery of Client's documents that were in Alpha's possession. Over Alpha's objection, the court ordered Alpha to produce Client's documents to the other party in the lawsuit. Alpha is not subject to malpractice liability for complying with the court order, even if Client urged Alpha to commit contempt of court by destroying the documents or refusing to turn the documents over to the other side.

Attorneys have been found liable for breaching the duty of care to the following:

1. Clients of the attorney, based on privity of contract. "Those who have entered into a contract for legal services with the lawyer have a claim against the lawyer for negligence (legal malpractice). *ABA/BNA Lawyer's Manual on Professional Conduct*, 301:602 (2011).
2. Third-party non-clients, where the attorney's client committed a fraud or crime that the attorney either failed to prevent or furthered by aiding and abetting. *Restatement (Second) of Torts* § 876 (1977).
3. Non-client beneficiaries of a will that the attorney negligently drafted, where the will's beneficiaries lost their bequest. Most states (but not New York) allow the will's beneficiary to assert a third-party beneficiary claim against the attorney. *Restatement (Second) Contracts* §§ 304 and 302; *Restatement (Third) of the Law Governing Lawyers* § 51.
4. Third-parties who are killed or physically harmed by the client, where the attorney knew of the client's intent and did nothing to prevent the third party's injuries. *N.J. Rules of Prof. Conduct R. 1.6(b)* (2000);
5. To non-clients where the attorney agrees to perform a particular task (such as filing a deed or mortgage satisfaction) and neglects to do so. Liability in such cases is based on the lawyer's duty to act reasonably after inviting a non-client's reliance on the lawyer's representation or agreement to act. *Restatement (Third) of the Law Governing Lawyers* § 51(2)(a); Kevin H. Michels, *Third-Party Negligence Claims Against Counsel*, 22 *Geo. J. Legal Ethics* 143 (2009).

5. Proximate Legal Cause

The plaintiff must prove that the attorney's breach of duty proximately caused the plaintiff's pecuniary injury. The plaintiff must demonstrate that, "but for" the negligence, the client would have prevailed in the underlying action and recovered a collectable judgment or asserted a successful defense, i.e., the client would have succeeded had the lawyer exercised due care. *Dan B. Dobbs, The Law of Torts* §723, Vol. 4, p.23 (2d ed. 2011).

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Where the attorney's negligence occurred during the course of litigation, the plaintiff must demonstrate that she would have been successful in the underlying case had the lawyer exercised reasonable care. A lawyer will not be liable for negligence or malpractice if the client had no cause of action or meritorious defense. *Frank v. Pepe*, 186 Misc. 2d 377 (Sup. Ct. Nassau Co. 2000).

The states are split as to who has the burden of proving proximate cause in a malpractice action. An attorney who has been sued will assert that it is the client's burden to establish that, but for the attorney's malpractice, the client would have been awarded a collectable judgment or that the client had a valid defense that would have avoided liability. However, New York and a number of other jurisdictions place this burden on the attorney. See *Restatement (Third) of the Law Governing Lawyers* § 53 cmt. b.; *Romanian Am. Interests v. Scher*, 94 A.D.2d 549 (2d Dep't 1983). "It would be unfair to require a client to anticipate and disprove every possible defense which may have been raised had the action been tried. Therefore, the onus . . . should most appropriately be upon the attorney." *Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice*, §27.9 at 651 (3d ed. 1989).

Criminal malpractice claims are almost impossible to maintain. In most jurisdictions a criminal defendant cannot sue defense counsel for malpractice unless the underlying criminal conviction has been set aside based on either innocence or a colorable claim of innocence. Therefore, prior to asserting a malpractice claim against a criminal defense attorney, the convicted defendant must obtain post-conviction relief or prove herself or himself innocent of the crime. *Cira v. Dillinger*, 903 So. 2d 367 (Fla. Dist. Ct. App. 2005); *Johanna Hickman, Current Developments 2004-2005: Recent Developments in the Area of Criminal Malpractice*, 18 Geo. J. Legal Ethics 797 (2005). "This requirement is central to the determination of causation in a cause of action for legal malpractice arising from a criminal proceeding. The client must show that the attorney was the proximate cause of his or her conviction But because he cannot assert his innocence, public policy prevents maintenance of a malpractice action against his attorney." *Britt v. The Legal Aid Soc'y, Inc.*, 95 N.Y.2d 443, 446-47 (2000); see also *Casement v. O'Neil*, 28 A.D.3d 508 (2d Dep't 2006); *Coscia v. McKenna & Cuneo*, 25 P.3d 670, 676 (Cal. 2001).

Simply asserting a lawyer's failure to raise certain constitutional or procedural defenses that would have altered the outcome is not sufficient to state a claim for legal malpractice.

6. Damages

The malpractice plaintiff must prove that the attorney's negligence caused him or her to suffer damages. The plaintiff may recover all damages directly and proximately flowing from the attorney's malpractice. *Joseph J. Kelleher, An Attorney's Liability for the Negligent Infliction of Emotional Distress*, 58 Fordham L. Rev. 1309 (1990). In addition, the plaintiff must prove that the judgment forfeited due to the lawyer's malpractice actually could have been recovered, i.e., there was sufficient liability insurance or the defendant was sufficiently solvent. *Dan B. Dobbs, The Law of Torts* §730, Vol. 4, p.63 (2d ed. 2011). If the defendant was "judgment proof" or insolvent, the attorney's negligence caused no harm and the plaintiff will recover nothing. *Lindenman v. Kreitzer*, 7 A.D.3d 30, 31 (1st Dep't 2004) (requiring the lawyer to disprove the collectability of any judgment the client would have recovered but for the lawyer's malpractice); *Mahoney v. Manfredi*, 166 A.D.2d 557 (2d Dep't 1990). Courts are divided as to which party has the burden of proving that but for the plaintiff's lawyer's malpractice, the successful judgment would have been paid to the plaintiff. 83 USLW 571 (10-21-14).

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Ordinarily, emotional distress is not recoverable in a legal malpractice action. However, courts have allowed emotional harm damages “without any proof of physical harm if the defendant’s malpractice is of the kind that runs the risk of substantial emotional distress,” like an attorney “who negligently allows an entirely sane client to be dispatched to a mental hospital” or where the malpractice destroys the client’s reputation. *Dan B. Dobbs, The Law of Torts §729, Vol. 4, p.61 (2d ed. 2011)*.

7. Admissibility of Ethics Rules in a Malpractice Action

A lawyer’s violation of an ethics rule or statute regulating lawyers’ conduct that does not provide a damages remedy does not give rise to a claim of negligence per se. *Preamble and Scope ¶ 20; Restatement (Third) of the Law Governing Lawyers § 74(2)*. However, since the Rules establish standards of conduct by lawyers, violation of an ethical rule may be relevant and admissible evidence of a breach of the applicable standard of conduct. *Preamble and Scope ¶ 20*.

8. Expert Testimony Required in Claims for Legal Malpractice

Generally, in a legal malpractice claim, the client must offer the opinion of an expert (typically an experienced attorney or law professor) to establish the standard of care owed by the defendant-attorney. Expert testimony is required because the jury generally cannot apply negligence principles to professional conduct without evidence of what legal duty (standard of care) is owed, i.e., what a reasonable attorney would have done under similar circumstances. In addition, the jury should not be permitted to speculate about what the professional norms might be. Exceptions arise where an attorney’s malpractice is so obvious that it can be identified by a lay person without expert testimony. For example, expert testimony may not be necessary where a plaintiff’s attorney permits the statute of limitations to expire, fails to raise an obvious affirmative defense, or withdraws from representing a client without proper notification.

9. Additional Liability

In addition to legal malpractice liability, a lawyer may be liable for conduct for which a non-lawyer would be liable under similar circumstances, e.g., defamation, breach of the warranty of authority, conversion (e.g., converting escrow funds), or fraud.

A lawyer acts as an agent for the client. Generally, a lawyer will not be liable for injuries to a non-client for legal services or advice the lawyer gave to a client, even if the client commits a tort. Where, however, the agent-lawyer commits or assists the client in committing fraud, the lawyer will be personally liable for the tortious conduct. For example, a lawyer who aides a client in committing securities or tax-shelter fraud by knowingly rendering a fraudulent opinion letter to investors will be considered to be actively assisting the client in tortious conduct, and, thus, will be personally liable to investors who relied on the lawyer’s misleading opinion letter.

Of course, even if a malpractice action is not successful, the attorney may still be subject to discipline.

10. Attorney’s Defenses Against Non-Clients

Lawyers who are sued personally for conduct undertaken for clients have several defenses.

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a. Defamation Claims Against the Lawyer

In a defamation claim against the lawyer, the lawyer may assert:

1. An absolute privilege against defamation liability for publishing a defamatory statement relating to civil or criminal litigation before a tribunal exercising a judicial function, even if the lawyer acts maliciously and knows the statement to be false. Statements made in pleadings, motion papers, settlement negotiations, depositions, or at trial are absolutely privileged with respect to claims of defamation. The privilege even extends to statements that are made prior to the commencement of a lawsuit, e.g., a letter to an opposing counsel or a statement made in a settlement proposal. “The privilege, however does not protect statements directed to persons not involved in the litigation, or statements having no relevant connection with the proceedings.” *Restatement (Third) of the Law Governing Lawyers §57 cmt. c.*
2. A qualified privilege covering defamation in which the speaker and listener have a common interest in the subject matter. This privilege protects conversations between the attorney and the client on matters involving the legal representation. However, this privilege is forfeited if the lawyer made the statement with either common law malice (spite or ill will) or constitutional malice (knowledge that the statement was false or a reckless disregard of whether it was false (a high degree of awareness that it might be false). *Restatement (Third) of the Law Governing Lawyers § 57.*

b. Intentional Tort Claims

In a claim against a lawyer for abuse of process, malicious prosecution, or false arrest, the lawyer is not liable to a non-client if the lawyer had probable cause for acting. *Restatement (Third) of the Law Governing Lawyers §57(2).*

c. Tortious Interference with a Contract Claim

A person who intentionally and improperly interferes with an executory contract by knowingly inducing one of the contracting parties to breach the contract is liable to the other party to the breached contract for resulting consequential and punitive damages. Absent fraud or bad faith, however, a claim for tortious interference of a contract cannot be asserted against a lawyer who advises a client to breach a contract. Simply giving legal advice or urging a client to breach an executory contract does not constitute assisting the client in tortious conduct. *Restatement (Third) of the Law Governing Lawyers § 57 cmt. g.* Therefore, so long as the lawyer does not use wrongful means to assist the client’s objective, the lawyer will not be personally liable for advising the client to breach a contract. *Restatement (Third) of the Law Governing Lawyers § 57(3).*

So long as the lawyer acts or advises [a client] with the purpose of promoting the client’s welfare, it is immaterial that the lawyer hopes that the action will increase the lawyer’s fees or reputation as a lawyer or takes satisfaction in the consequences to a non-client. Nor does a lawyer become liable to a non-client for giving with a proper purpose advice that is negligent or harms the non-client. But a lawyer who acts or advises a client for the lawyer’s own benefit, for example so that the client will enter contractual relations with a business in which the lawyer owns an interest, is subject to liability to a non-client when the lawyer’s activities satisfy the other [elements] of the tort [of tortuous inference

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of a contract]. A lawyer may also be liable to a non-client for assisting a client with a proper purpose but by wrongful means, such as threatening the non-client with an unfounded criminal prosecution in order to induce the non-client to cancel a contract.

Restatement (Third) of the Law Governing Lawyers § 57 cmt. g.

11. Disclosing Malpractice Insurance

The ABA has reported that two-thirds of all legal malpractice claims between 2011 and 2015 involved sole practitioners and small law firms between two and five lawyers. To protect lawyers from career-ending claims and the substantial expense in defending even unfounded claims, seven states require lawyers purchase malpractice insurance and eighteen states require disclosure whether the lawyer carries malpractice insurance on their attorney registration forms which are open to the public. *46 The Colorado Lawyer 79, n. 6 (Feb. 2017)*.

In 2004, the ABA adopted a standalone rule on malpractice insurance disclosure to clients, called the *Model Court Rule on Insurance Disclosure*, requiring that lawyers provide this information to the highest court in the state if they are actively practicing and whether they are currently covered by insurance for malpractice. If the lawyer is exempt from malpractice insurance this must be disclosed, e.g. a government lawyer or an in-house counsel. If the lawyer's malpractice insurance is cancelled during the year, this likewise must be disclosed. *Ronald D. Rotunda, Legal Ethics § 1-4-1 at 149 (2015-2016)*.

F. REMEDIES OTHER THAN MALPRACTICE

In addition to legal malpractice, the lawyer's misconduct may also give rise to the following:

1. Professional discipline;
2. Injunctive relief;
3. The client's rescission of the contract;
4. Restitution to the injured client;
5. Punitive damages;
6. Legal fee reduction or forfeiture;
7. Litigation sanctions imposed by a court; and
8. Breach of contract and/or breach of fiduciary duty claims.

When a client retains a lawyer, an implied in law contract arises that obligates the lawyer to exercise good faith and due care in carrying out the client's objectives. Even where a lawyer may not be civilly liable, the lawyer may be subject to discipline for professional misconduct, e.g., frivolous conduct or misrepresentation.

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If the lawyer expressly promises specific results but does not deliver, the promise may give rise to a claim for breach of contract. However, the guarantee must be clear and may not be a mere prediction or expectation.

EXAMPLE:

Client was charged with a serious felony and consulted Attorney Alpha. Alpha told Client “with my 25 years of experience in criminal defense, coupled with my six years of prosecutorial experience, I believe that I can get you acquitted.” This statement is a prediction and not a promise upon which the lawyer could be sued for breach. *Restatement (Third) of the Law Governing Lawyers § 55 cmt. c.*

In addition to or in lieu of claims for legal malpractice, breach of contract, or injunction, where appropriate, a client may submit a claim for negligent or intentional breach of fiduciary duty caused by a lawyer’s misuse of client confidential information or by the lawyer’s knowingly, recklessly, or negligently becoming involved in a conflict of interest with a client.

EXAMPLE:

Client retained Attorney Alpha to represent him in a litigation action. Before commencing suit, Alpha neglected to investigate her law firm’s other clients to ascertain whether there were any conflicts of interest. Alpha filed and served a complaint in Client’s action. Just before moving to enjoin the defendant, Alpha learned that another lawyer in Alpha’s firm had formerly represented the defendant in Client’s action in a matter substantially related to Client’s claim. Due to this conflict, coupled with Alpha’s failure to obtain the consent of the parties, Alpha was required to withdraw as counsel for Client. A prior reasonable search of Alpha’s law firm’s records would have uncovered the conflict of interest (negligence on Alpha’s part). Once Alpha withdrew, several weeks passed before a new law firm was able to obtain an injunction. As a result, Client suffered damages. Under these facts, Alpha is liable to Client for negligent breach of fiduciary duty.

Note that if Alpha knew that she or another member of the law firm had a conflict of interest with Client’s matter, her intentional conduct would give rise to an intentional breach of a fiduciary duty that could also result in punitive damages. If, on the other hand, a reasonable search of the law firm’s client database was undertaken and no conflict of interest appeared, then a later discovered conflict of interest would not result in a claim against Alpha for breach of fiduciary duty because, under this scenario, there would not be an intentional or negligent act by Alpha.

Note that if an attorney is sued civilly or criminally by anyone, including the client, in a matter that involved the representation of the client, the attorney is permitted to disclose, to the extent necessary, relevant information that otherwise would be a client’s confidential information in order to establish a defense to the lawsuit. The lawyer also may reveal secrets and confidences necessary when suing to collect a legal fee. *Rule 1.6(b)(5).*

G. AIDING AND ABETTING CLIENT WRONGS

Although an attorney should not be liable for rendering legal advice to a client who then commits harmful acts toward others, a lawyer who knowingly aids and abets a client's tortious conduct can be held personally liable. *Restatement (Second) Torts section 876(b)* provides that a person is subject to liability to third parties who are harmed by the tortious conduct of another if the lawyer gives substantial assistance or encouragement to the tortfeasor. Thus, where a lawyer renders substantial assistance to a client who breaches a fiduciary duty or commits fraud, the lawyer will open herself to personal liability to the person harmed. *Granewich v. Harding*, 985 P.2d 788 (Or. 1999) (lawyer was charged with personal liability for assisting majority shareholders in ousting minority shareholder and in devaluing the corporate stock because he knew that his client was breaching his fiduciary duty owed to minority); *Thornwood, Inc. v. Jenner & Block*, 799 N.E.2d 756 (Ill. Ct. App. 2003) (lawyer was correctly charged for assisting one partner with misappropriating a partnership opportunity).

H. LIMITING LIABILITY

1. Generally

A lawyer shall not make an agreement to prospectively limit the lawyer's liability for malpractice unless the client is represented by independent legal counsel in entering the agreement. *Rule 1.8(h)(1)*; *Restatement (Third) of the Law Governing Lawyers § 54(2)*. A lawyer who attempts to prospectively limit malpractice liability in a retainer agreement or elsewhere is subject to professional discipline. *Rule 1.8(h)*.

Rule 1.8 does not prohibit a lawyer from entering into an agreement with the client to arbitrate malpractice claims. However, the agreement must be enforceable and the client must be fully informed of the scope and effect of the agreement. *Rule 1.8 cmt. 14*.

A lawyer may limit liability to non-clients by including a disclaimer that the attorney's work product is intended solely for the client's benefit and should not be relied upon by others. Similarly, the lawyer can disclose that the lawyer's opinion letter is based solely on information supplied by others and that the lawyer has not independently verified or investigated these facts but has assumed that the facts supplied by others are accurate. *Restatement (Third) of the Law Governing Lawyers § 51 cmt. e*.

Since Rule 1.2(c) permits a lawyer and client to limit the scope of the representation and the matters for which the lawyer is responsible, such limitation can effectively limit the scope of the liability for which the lawyer can be held responsible.

2. Settlement of the Client's Malpractice Claim

Agreements settling malpractice claims or potential malpractice claims are allowed. However, before the attorney can negotiate with the client, the lawyer must advise the client, in writing, that the client may seek the advice of independent counsel and must provide the client with a reasonable opportunity to do so. The attorney may then attempt to settle with the client. *Rule 1.8(h)(2)*; see also *A.B.A. Informal Op.* 1010 (1967); *N.Y. State Ethics Opinion* 275 (1972); *Rule 1.8 cmt. 15*; *Restatement (Third) of the Law Governing Lawyers § 54(b)*.

PIEPER - PROFESSIONAL RESPONSIBILITY

If the lawyer negotiates a settlement agreement with a client or former client, the settlement may be vacated by the client if:

1. The lawyer subjected the client to improper pressure (e.g., the lawyer refused to return funds or documents unless the client signed a release); or
2. The client was not represented by independent counsel and the settlement was not fair and reasonable to the client. *Restatement (Third) of the Law Governing Lawyers § 54(3)(b)(i) and (ii)*.

3. Vicarious Liability

a. Generally

In a partnership, lawyers and law firms are jointly and severally liable for the tortious acts of all partners, associates, or employees acting within the scope of and in furtherance of the law firm's business. *Restatement (Third) of the Law Governing Lawyers § 58*. However, "[t]he lawyers of a corporate law department [e.g., General Motors] are not vicariously subject to each other's liabilities under this section A department lawyer who participated in the acts giving rise to liability is directly, but not vicariously liable" *Restatement (Third) of the Law Governing Lawyers § 58 cmt. c*.

Even where lawyers never form a partnership, if the sign on their door or their stationery indicates the existence of a partnership, the lawyers will be estopped from denying the existence of a partnership and will be jointly and severally liable for each other's malpractice and other torts.

Vicarious liability can also arise when one lawyer expressly agrees to share in malpractice liability of a referring lawyer as a condition to sharing in the fee. *Restatement (Third) of the Law Governing Lawyers § 58 cmt. e*.

Generally, vicarious liability is not imposed on a lawyer for the tortious conduct of independent contractors (e.g., a stenographer hired to take down a deposition) unless the work involved a non-delegable duty owed by the lawyer or the lawyer was negligent in selecting an unfit independent contractor. A duty will be deemed non-delegable when the responsibility is so important to the public that the employer-lawyer should not be permitted to transfer it to another. For example, the duty owed by an attorney to exercise due care in serving process cannot be delegated to an independent contractor. *Kleeman v. Rheingold, 81 N.Y.2d 270 (1993)*.

b. Professional Corporations & Limited Liability Companies

A "law firm" includes a professional corporation ("P.C.") or a limited liability professional company or partnership formed to limit the personal vicarious liability of its members. These entities do not protect the lawyer(s) whose tortious conduct caused the injury; they prevent the imposition of vicarious liability on other members of the firm.

The Rules allow the practice of law under a "P.C." or other limited liability companies, provided that a non-lawyer does not:

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1. Own any stock in the P.C. (except that the estate of a deceased lawyer-shareholder may hold the stock for a reasonable period during administration of the estate (*Rule 5.4(d)*);
2. Act as a corporate director or officer; or
3. Have the right to direct or control the professional judgment of a lawyer.

CHAPTER VI

LITIGATION AND OTHER FORMS OF ADVOCACY

A. EXERCISING PROFESSIONAL JUDGMENT

1. Generally

The lawyer must always keep the client reasonably informed on all aspects of a litigation as it progresses. *Rule 1.4(a)*. The bar candidate can reach a correct conclusion to questions in this area by simply applying agency rules to determine the agent's duty. That duty owed by the agent (lawyer) is to keep the principal (client) advised of all relevant information and events within the scope of the agency relationship. The lawyer shall comply with a client's reasonable request for information (including billing information). *Rule 1.4(a); Restatement (Third) of the Law Governing Lawyers §§ 20 and 38*. A lawyer, however, is not required to respond to every client request as often as the client desires as long as the lawyer's responses are "reasonable under the circumstances." *In re Schoeneman*, 777 A.2d 259, 264 (D.C. 2001). A lawyer, like any agent, may take such action on behalf of the client as is impliedly authorized in carrying out the representation. *Rule 1.2(a)*.

The lawyer must explain a matter to a client to enable the client to make informed decisions. *Rule 1.4(b)*. The lawyer has a duty to fully inform the client of the relevant law and facts (e.g., to fully explain the ramifications of litigation, the contents of a contract, a will provision, or the effect of giving a release to a joint tortfeasor prior to trial). *Rule 1.4*.

The most common failing of an attorney's communication is the lawyer's failure to notify the client of a settlement offer until after it has been withdrawn. *Stark County Bar Ass'n v. Russell*, 856 N.E.2d 976 (Ohio 2006). Generally, the lawyer must convey to the client a civil settlement offer or, in a criminal case, a plea bargain offered by a prosecutor, "unless prior discussions with the client have resolved what action the client wants the lawyer to take." *Rule 1.4 cmt. 2*. Thus, a lawyer who has been given complete authority to settle a case need not advise the client of every offer. *Rule 1.4 cmt. 1*.

EXAMPLE:

Attorney A represented 35 claimants in an action against a housing developer. Attorney A negotiated an aggregate settlement of \$1.8 million for all the claimants. Claimants B and C agreed to accept \$40,000 each and signed a release against the developer.

HELD:

The release and settlement were deemed invalid because they were made in contravention of Rule 1.8(g). Claimants B and C were not given a list showing the names and amounts to be received by the other plaintiff settling the action. *Rule*

PIEPER - PROFESSIONAL RESPONSIBILITY

1.8(g) requires that a client be fully informed before consent in a writing, signed by the client, is obtained. *Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d 442 (Tex. 1985).

Most bar grievance committee members will readily admit that the genesis of most disciplinary complaints lodged by clients is the lawyer's unwillingness or inability to timely communicate with the client on the pending matter.

2. Client's Decision

Under Rule 1.2(a), certain decisions are reserved for the client. It is the client who decides whether and on what terms to settle a civil claim. In a criminal case the client determines whether to plea, what defenses to assert, whether to waive a jury trial, or whether to testify. *Rules 1.2 and 1.4*. The Second Circuit Court of Appeals has held that whether to accept or reject a plea offer is "ordinarily the most important single decision in any criminal case." *Boria v. Keene*, 99 F.3d 492, 496-97 (2d Cir. 1996). Thus, any plea offer should be promptly conveyed to the client for due consideration. *Rule 1.4(a)(3)* ("keep the client reasonably informed about the status of the matter"); *Shiwochan v. Portuondo*, 345 F. Supp. 3d 242 (S.D.N.Y. 2004), *aff'd*, 150 Fed. Appx. 58 (2d Cir. 2005). In either a civil or criminal case, it is the client's decision whether to appeal. *Rule 1.2(a)*; *Restatement (Third) of the Laws Governing Lawyers* § (22)(1). The client can expressly or impliedly delegate that authority to the lawyer, e.g., "do whatever you think is best." The delegated authority may be withdrawn by the client at any time, however.

The attorney should ascertain the client's objectives, the desired means to achieve the client's goals, and the lawyer must abide by his client's wishes if within the confines of the Rules. *Rule 1.2(a)*. If the lawyer becomes aware that the client expects the lawyer to act in a manner not permitted by the Rules, or not in the lawyer's best judgment, or the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the ethical and legal limitations on the lawyer's conduct. *Rule 1.2 cmt. 13*.

EXAMPLE:

Attorney Alpha is a long-time golfing buddy of Judge James. Upon retaining Alpha, Client told Alpha "I want you to fix this case with Judge James when you see her on the golf course this weekend. I'm willing to bribe the judge if that is what it takes." Alpha responded, "Don't worry, I'll do everything I have to do to win your case." That weekend Alpha played golf with the judge but said nothing about the client's case.

Here, Alpha's conduct is improper because if a lawyer knows that a client expects legal assistance that is not permitted by the Rules of Professional Responsibility or other law, or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations of the lawyer's conduct. *Rule 1.4(a)(5) and Rule 1.2 cmt. 13*.

A lawyer must abide by a client's decision regarding the objectives of the representation. Thus, if the client is lending money and advises the attorney that the loan is to be secured by a first mortgage on the borrower's property, if the lawyer only obtains a second mortgage, then the lawyer has violated Rule 1.2(a) by failing to abide by the client's decision regarding the objective of the

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legal representation. The same would be true if the client told her attorney that she would accept \$30,000 to settle her claim; the lawyer has authority to settle for no less than \$30,000.

If the client's instructions are unethical or even merely objectionable, the attorney must so advise the client, and, if the client insists that the lawyer adhere to the instructions, the lawyer may withdraw. "However, a lawyer may not continue representation while refusing to follow a client's continuing instruction." *Restatement (Third) of the Law Governing Lawyers* § 21 cmt. d.

QUERY:

What if the lawyer wants to conduct pretrial discovery, but the client, for tactical or financial reasons, does not want the discovery undertaken?

If a lawyer intends to act contrary to a client's instructions then, the lawyer must consult with the client. *Rule 1.2 cmt. 13*. The lawyer and client are free to bargain and discuss the means used. If an agreement cannot be reached, the lawyer can advise the client that the client can retain another lawyer. Rule 1.16(b)(4) allows an attorney to withdraw if "the client insists upon taking action . . . with which the attorney has a fundamental disagreement."

3. Lawyer's Decision

The lawyer charts the procedural and tactical decisions in the case. *Faretta v. California*, 422 U.S. 806, 820 (1975); *Henry v. Mississippi*, 379 U.S. 443, 449-52 (1965). As long as the lawyer acts competently, matters of strategy are the lawyer's domain. For example, the lawyer decides when to place the case on the calendar, whether to grant an adversary's request for additional time, what jurors to accept or strike, what trial motions to make, to what extent to cross-examine a witness, or whether to present or refuse to present certain witnesses. See e.g., *ABA Standards Relating to the Administration of Criminal Justice* § 4-5.2(b) (3d ed. 1993).

4. Client with Diminished Capacity

Where an attorney represents an infant, senile senior citizen, drug addict, alcoholic, illiterate or special needs individual, the Rules implore the attorney to make efforts to communicate with and explain the situation to the client as well as possible.

After advising a client with diminished capacity, generally, the lawyer still is obligated to follow the client's instructions even if the lawyer does not agree with the client's decisions.

The lawyer is to maintain a normal client-lawyer relationship, to the extent reasonably possible, with a client whose ability to make adequately considered decisions is impaired. *Rule 1.14(a)*.

A lawyer must ethically respect the client's autonomy to the greatest extent possible, consistent with existing circumstances. The lawyer should seek the appointment of a conservator, guardian, or committee when the lawyer reasonably believes that such appointment would serve the best interests of the client. *Rule 1.14(b)*.

PIEPER - PROFESSIONAL RESPONSIBILITY

A client's mental or physical impairment places an additional duty upon the lawyer. If the incompetent has a guardian or other legal representative, the lawyer must look to that guardian to make decisions for the client. *Rule 1.14 cmt. 4*. If the client has no such guardian and is not totally incompetent, then the lawyer often must act as de facto guardian for the client's best interests. *Rule 1.14 cmt. 7*.

Where the lawyer believes that a client with a seriously diminished capacity is at risk of physical, financial, or other harm unless action is taken, the lawyer may take reasonably necessary protective action, including seeking appointment of a guardian. *Rule 1.14(c)*. In such cases, the lawyer may be impliedly authorized under Rule 1.6 to reveal confidential information to protect the client's best interests. *Rule 1.14(c) cmt. 5*. Rule 1.6 provides in pertinent part: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation." *Rule 1.6(a)*.

For example, a lawyer could disclose to a third person the client's declared intent to commit suicide because the client cannot adequately act in the client's own best interests. *A.B.A. Informal Op. 83-1500 (1983)*.

A.B.A. Informal Opinion 1530 permits a lawyer of a medication-abusing client, who refused to discuss the matter, to consult with the client's physician regarding the client's condition. *A.B.A. Informal Op. 89-1530 (1989)*. The Rules encourage "the lawyer to seek guidance from an appropriate diagnostician before proceeding. It is difficult to think of a more appropriate diagnostician with whom the lawyer can consult concerning a client's suspected disability than a physician who, incidentally, is also subject to a duty to maintain confidences communicated by the patient or on the patient's behalf . . . [D]isclosure by the lawyer of information relating to the representation to the extent necessary to serve the best interests of the client" is thus permitted. *Id.*; *Rule 1.14 cmt. 5*.

5. Assisting a Client in Fraudulent or Criminal Conduct

Rule 1.2(d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or civil fraud, e.g., by drafting or delivering documents that the lawyer knows are fraudulent or suggesting how the wrongdoing should be concealed. *Rule 1.2(d)*. Where the lawyer initially thinks that the client's conduct is proper, but subsequently discovers criminality or wrongdoing, "the lawyer must . . . withdraw from the representation." *Rule 1.2 cmt. 10*.

EXAMPLE:

Let's say next year a client comes into your office to have you form a limited liability company and some other matters in getting the client's venture up and running. Within a month or two you suspect that the client is involved in a criminal money laundering scheme. Where in the Rules do you seek guidance?

Rule 1.2 asserts you are obligated not to assist a client in committing fraud or a crime.

Rule 1.6 asserts you *may* but are not obligated to reveal client confidential information if necessary to prevent or to rectify a fraud or a crime if the lawyer's services have aided the issue or fraud.

LITIGATION AND OTHER FORMS OF ADVOCACY

Rule 1.2(d) guides the lawyer's future dealings with any client: "A lawyer shall not counsel a client to engage or assist a client in conduct the lawyer knows is criminal or fraudulent."

Preamble to the Rules [9] provides that a lawyer zealously pursues only a client's "legitimate interest."

B. CIVILITY, COURTESY AND DECORUM

The professional ideal for the relationship between opposing advocates is that they bear toward each other a respectful and cooperative attitude marked by civility, consistent with their primary responsibilities to their clients Certain conduct toward other participants, including opposing lawyers, is prohibited including unlawful physical force or its threat, racial or gender or similar slurs, and charges of wrongdoing made recklessly or knowing them to be without foundation.

Restatement (Third) of the Law Governing Lawyers § 106 cmt. d; see Rule 3.5(d).

When an attorney repeatedly makes derogatory remarks towards an adversary, the attorney may be disciplined. *See State v. Turner*, 538 P.2d 966 (Kan. 1975); 87 A.L.R.3d 351 (1978). Illustrations of such remarks are as follows:

1. A statement in open court that an adversary was "dense, a culprit so lacking in mental capacity as not being able to find his way to the toilet, a skunk, lazy, tricky and a little yellow son-of-a-bitch." *In re Crumpacker*, 383 N.E.2d 36, 48 (1978), *cert. denied*, 444 U.S. 979 (1979), *appeal dismissed*, 470 U.S. 1074 (1985).
2. The statement, "Now, if Your Honor is going to cover him up, fine: Kiss him off, send him back to the country club, let him get up on a bar stool and continue drinking. There he could find better people to argue with." *Id.*
3. A statement in open court that the adversary was "a high-priced lawyer." *Hawk v. Superior Court*, 42 Cal. App.3d 108 (1974), *cert. denied*, 421 U.S. 1012 (1975).
4. Counsel at first threatening opposing counsel and then, in the judge's chambers, actually grabbing him in an attempt to choke him. *In re McAlevy*, 354 A.2d 289 (N.J. 1976); *In re Vincenti*, 92 N.J. 591 (1983); 114 N.J. 275 (1989). In New Jersey, the practice of law can be a little rough and tumble.
5. A prosecutor referring to the defense counsel as "you sleaze," "you hypocritical son of a bitch," and stating "you are so unlearned in the law." *U.S. v. Biasucci*, 786 F.2d 504, 514 (2d Cir. 1986).

C. CONDUCT IN THE COURSE OF LITIGATION

1. A Lawyer Must Comply With Applicable Laws

The goal of an advocate is to present evidence that is favorable to the position of the attorney's client and to oppose and object to evidence that is not. The attorney, when retained by a client, has an inherent conflict between zealously representing the client and assuring that the representation fits within the bounds of the law and the ethics rules. Thus, when appearing in court, an administrative agency hearing, or an arbitration proceeding, a lawyer must comport with ethics rules, rules of evidence and procedure, as well as the rules of the tribunal.

An attorney shall not knowingly disobey the rules of a tribunal. *Rule 3.4(c)*. Thus, all court orders must be obeyed. If a privilege is claimed, the lawyer should invoke it so the judge can rule on it and preserve the record.

The attorney's duty is to achieve, by lawful means, any lawful objective sought by the client. Generally, the attorney may act in two different capacities. One is as an advisor for purposes of advice and prognostication; the second is as an advocate for purposes of diagnosis and defense or pursuit of a claim. [See generally, *infra*, Chapter VII.] As an advisor, the attorney should never encourage or aid a client to commit a criminal act, or counsel a client on how to violate the law. As an advocate, the attorney must urge any permissible construction of the law without regard to his or her own professional opinion as to the likelihood of success, as long as such an argument is not frivolous. In litigation, all doubts are resolved in favor of the client's position provided there is a good faith argument to support that position, even if the attorney does not think the position will prevail.

Rule 3.2 requires a lawyer to "make reasonable efforts to expedite litigation consistent with the interests of the client." As long as the client's interests are lawful and not done for harassment or other unethical purposes, the lawyer can delay the proceedings. *Ernest F. Lidge III, Client Interests and a Lawyer's Duty to Expedite Litigation: Does Model Rule 3.2 Impose Any Independent Obligations*, 83 St. John's L. Rev. 307, 310-11 (2009).

EXAMPLE:

Filing a frivolous appeal solely to delay paying a judgment has been held to be improper. *Acevedo v. Immigration & Naturalization Serv.*, 538 F.2d 918 (2d Cir. 1976); accord *Rule 4.4(a)* (prohibiting the use of means that have "no substantial purpose other than to embarrass, delay, or burden a third person").

EXAMPLE:

"[S]eeking delay in a trial date in order to gather additional relevant evidence is non-frivolous. On the other hand, delaying a trial solely to permit a client to extract a nuisance-value settlement is an improper purpose." *Restatement (Third) of the Law Governing Lawyers* § 106 cmt. e. Thus, under Rule 3.2, a lawyer should act promptly provided it is consistent with the lawyer's interest.

Although there is a duty to seek all of a client's lawful objectives, in order to avoid injustice, the attorney may ask a client for permission to forego asserting a right or defense. For example, in a

LITIGATION AND OTHER FORMS OF ADVOCACY

situation where an attorney fails to assert a valid Statute of Frauds or the Statute of Limitations defense, the attorney is guilty of malpractice and acting in violation of the Rules for failing to assert such a defense in the absence of the client's permission. However, where such a defense would work an injustice on the other side, the attorney may speak with the client and, provided the client's "informed consent" is obtained, forego asserting such a defense in the interest of justice.

As an advisor to a client, the attorney should opine as to the legal consequences of the client's future actions, and the lawyer may proffer moral, social, or economic guidance relevant to the client's matter. *Rule 2.1.*

In non-litigated matters, if the client declines to follow the attorney's suggested advice and judgment, the attorney may withdraw from the relationship if the client insists on pursuing an objective that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. *Rule 1.16(b)(4).*

The loyalty owed by an attorney to a client is great, but the attorney need not personally adopt viewpoints in conformity with the client's position. *Rule 1.2(b).* In fact, the attorney may take positions on public issues and espouse legal reforms the lawyer personally favors without regard to the individual views of the client. The attorney should participate in proposing and supporting legislation and programs to improve the legal system without regard to the general interests or desires of clients or former clients.

Rule 1.2(d) asserts that "[a] lawyer shall not counsel a client to engage, or assist a client in conduct the lawyer knows is criminal or fraudulent." In requiring a lawyer to comply with applicable law, this requires, for example, the advocate to refrain from violating laws prohibiting racial, gender, or ethnic discrimination in the selection of juries. Also, biased or prejudiced words or conduct based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status may be unethical as prejudicial to the administration of justice. *Rule 8.4 cmt. 3.*

2. Contempt of Court

A lawyer "must comply with applicable law, including rules of procedure and evidence and specific tribunal rulings." *Restatement (Third) of the Law Governing Lawyers § 105.* Ordinarily, by disobeying a judicial ruling, the lawyer faces contempt of court and possible professional discipline. A lawyer, however, may (but is not required to) disobey and violate an otherwise nonappealable court order in good faith if necessary to obtain appellate review of the court's order involving an issue of first impression or if the nonappealable order is of questionable soundness. *Restatement (Third) of the Law Governing Lawyers § 105.*

Rule 3.5(d) asserts that a lawyer shall not "engage in conduct intended to disrupt a tribunal." This Rule is meant to prohibit conduct that would result in summary criminal contempt for a lawyer's obstruction of justice by degrading a judge or disregarding a judge's order in court.

An attorney is required to comply with known local customs of courtesy or practice of a particular bar or court. If the attorney intends to disregard them or to challenge them, he or she must give timely notice to opposing counsel. An attorney should not engage in undignified or discourteous conduct which is degrading to a tribunal, and an attorney should not intentionally or habitually violate any established rule or procedure of the court.

PIEPER - PROFESSIONAL RESPONSIBILITY

A lawyer should be punctual in fulfilling all professional commitments. In *In re Allis*, an attorney was held in contempt of court after he arrived 20 minutes late. 531 F.2d 1391 (9th Cir. 1975), cert. denied, 429 U.S. 900 (1976). On another occasion, an attorney was disbarred when he failed to timely file briefs. *In re Young*, 537 F.2d 326 (9th Cir. 1976).

EXAMPLE:

Carlin, a criminal lawyer, represented a client indicted for murder. At the trial, Carlin “repeatedly responded to rulings and other acts by the Court with statements of disbelief, profanity, obscenity, disparagement of the judge, statements of intentions not to abide by rulings, or combinations of such, and other manifestations of disrespect and discourtesy.” Carlin was held in contempt and subject to discipline. *Bar Ass’n. v. Carlin*, 67 Ohio St.2d 311 (1981).

Referring to a judge in court as a “fool” and the trial as a “farce” has been held to violate Rule 3.5(d). *In re Friedland*, 376 N.E.2d 1126 (Ind. 1978).

Rule 8.2(a) prohibits lawyers from making statements regarding the integrity and qualifications of a judge that the lawyer “knows to be false or with a reckless disregard as to its truth or falsity.” Under *Sullivan v. The New York Times*, this is referred to as constitutional malice required in a defamation claim by a public figure or public official. 370 U.S. 254 (1964). This standard is addressed to the subjective belief of the speaker. It also immunizes rhetorical hyperbole or opinion.

Although most courts apply an objective standard, and not the *Sullivan* subjective standard, several courts have used the subjective standard in forgiving a lawyer’s outrageous statements.

EXAMPLE:

When a lawyer in his pleadings called a judge a “racist and bigot,” it was held to be protected speech not in violation of Rule 8.2(a). *In re Green*, 11 P.3d 1078 (Colo. 2000).

EXAMPLE:

New York chose not to sanction a lawyer who described the New York State court system in a national magazine in the following manner: “There are so few trial judges who just judge, who rule on questions of law, and leave guilt or innocence to the jury. And Appellate Division judges aren’t any better. They’re the whores who become madams.” *Justices of the Appellate Division, First Dept. v. Erdmann*, 33 N.Y.2d 559, 560 (1973). See also *In re Buckley*, 514 P.2d 1201 (Cal. 1973), cert. denied, 418 U.S. 910 (1974).

EXAMPLE:

A lawyer was not sanctioned for an out-of-court statement that a judge was “ignorant, ill-tempered, [a] buffoon, [a] sub-standard human right wing fanatic, [and] a bully.” *Standing Committee on Discipline of the United States District Court v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995).

LITIGATION AND OTHER FORMS OF ADVOCACY

3. Trial Conduct

A lawyer's zealous representation does not justify destroying or withholding evidence. Before, during, and after a trial, an attorney is prohibited from destroying, concealing, or obstructing another party's access to evidence, or from counseling another to do so.

In the pre-trial stage, an attorney may not make a "frivolous" discovery request or knowingly disobey -- or advise a client to disobey -- a court order regarding discovery, nor may the attorney fail to make a reasonable, diligent effort to comply with a legally proper discovery request. Note, however, that under Rule 3.4(f), it is permissible for a lawyer to request that a client, relative, employee, or other agent of the client refrain from giving information to an opposing party's attorney until subpoenaed. However, it is improper for a prosecutor to interfere with defense counsel's access to or communication with prosecution witnesses. *Rule 3.4(a) and (f)*.

At trial, an attorney shall not refer to or introduce matters without a reasonable basis for believing that they either are relevant to the case or that any matter alluded to will be supported by admissible evidence. *Rules 3.4(e) and 4.4*. Attorneys cannot assert as fact either in opening or closing arguments that which has not been or will not be introduced in evidence. *ABA Standard for Criminal Justice § 4-7.7*. Rule 3.4 concurs by prohibiting lawyers from referring to evidence outside the record. Closing and opening arguments simply are not evidence. In that regard, it is improper for counsel to inject collateral issues, such as sympathy for a party or, in a criminal case, fear about the general crime problem. In a civil case, counsel should not encourage jurors to place themselves in the position of the plaintiff or defendant; likewise in criminal cases asking the jury to place themselves in the position of the victim or the defendant. Such arguments encourage the jury to reach a verdict on an improper emotional basis rather than reaching the verdict on the evidence presented. Attempting to inflame the jury improperly shifts the jury's attention away from the relevant issues in the case.

EXAMPLE:

In criminal summation, defense counsel repeatedly referred to the defendant's wife and children. This was construed as an emotional plea having nothing to do with defendant's crime of smuggling. Defense counsel was held in contempt. *U.S. v. Gustafson, 650 F.2d 1017 (9th Cir. 1981)*.

EXAMPLE:

At a criminal trial, defense counsel clandestinely switched the defendant's sister for the defendant and had the sister sit with him at the defense table. When the undercover police officer identified the sister as the defendant, defense counsel smugly announced that the officer had not identified his client. The Second Circuit Court of Appeals was not amused. It noted that the Ninth Circuit had previously characterized such a tactic as "misbehavior obstructing justice" and affirmed the attorney's conviction for criminal contempt. The Second Circuit said the disappearing client act violated the legal profession's ethical standards. *U.S. v. Sabater, 830 F.2d 7, 8 (2d Cir. 1987)*.

PIEPER - PROFESSIONAL RESPONSIBILITY

EXAMPLE:

In a criminal case, it is improper for a prosecutor to call the criminal defendant to the stand knowing that the defendant intends to invoke the Fifth Amendment right against self-incrimination. By doing so, the prosecution seeks to influence the jury “by means prohibited by law.” *Rule 3.5(a)*. In civil litigation, such questioning is permissible, because in civil cases, even though a civil defendant may invoke the Fifth Amendment, an inference then arises that, if the party had answered the question, the answer would have been unfavorable to that party’s position at trial. *Restatement (Third) of the Law Governing Lawyers § 107 cmt. c.*

EXAMPLE:

Attorney Beta was cross-examining witness Bill. Beta knew that four years ago Bill had been arrested for driving while intoxicated, but Beta also knew charges against Bill had been dismissed because of a mistaken identification of Bill. Beta, on cross-examination, asked Bill if he drank; Bill responded that he occasionally had a glass of wine with his dinner. Beta then asked Bill to just answer the next question “yes” or “no”: “Have you ever been arrested for driving while intoxicated?”

This questioning was improper because it had no substantial purpose other than to embarrass Bill.

An attorney shall not assert his or her personal knowledge of the facts in issue. *Rule 3.4(e)*. This Rule simply prohibits “I” statements, such as “I know,” “I believe,” or “I think.” Good trial practitioners simply replace the work “I” with the phrase “the evidence shows.” This rule also proscribes attorney assertions of disputed facts.

An attorney cannot state to the jury that a witness or a party lied. This is nothing more than counsel’s personal opinion. There are fairer ways to draw attention to inconsistencies in testimony. *People v. Mc Bride*, 228 P.3d 216, 221-22 (Colo. App. 2009); *Crider v. People*, 186 P.3d 39, 44 (Colo. 2008). In that regard, an attorney shall not assert the attorney’s personal opinion as to:

1. the justness of the cause. “Permitting advocates to make personal affirmations would by implication disparage the causes of a client for whom the chosen advocate could not conscientiously vouch, prejudicing the right of those with unpopular or difficult cases.” *Restatement (Third) of the Law Governing Lawyers § 107 cmt. b;*
2. the credibility of a witness (i.e., an attorney cannot personally vouch for a witness’s credibility). 45 A.L.R. 4th 602; *Restatement (Third) of the Law Governing Lawyers § 107(1);*

EXAMPLE:

A lawyer may not state his opinion that a witness lied or that a witness was very honest. *People v. Herr*, 868 P.2d 1121 (Colo. App. 1993). For example, “In my opinion, the witness is lying,” is prohibited. It is for the fact finder to determine whether a witness is credible. However, the lawyer, by using and arguing the evidence that has been given at trial, can *argue* the same point, e.g., “The witness’s

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testimony is unbelievable because it contradicts the sworn testimony of all the other eyewitnesses to the accident. Unlike this witness, all the others have no personal motive to fabricate.”

3. the culpability of a civil litigant;
4. the guilt or innocence of the criminal defendant. *Restatement (Third) of the Law Governing Lawyers* § 107(1).

For the court to permit a prosecutor’s remark that “if you do not convict, the guilty will escape” is reversible error “unless the remarks, fairly construed, refer only to a belief based on the evidence rather than to an opinion formed from the facts not in evidence.” *United States v. Schartner*, 426 F.2d 470, 477 (3d Cir. 1970). However, a lawyer may argue for any position or conclusion supported by the lawyer’s analysis of the evidence. *Restatement (Third) of the Law Governing Lawyers* § 107(1).

Although Rules 3.4(e), (c) and 4.4(a) state that counsel should not use subterfuge, allude to matters not in evidence, assert personal knowledge of facts, or give personal opinions, such practices, unfortunately, nevertheless occur frequently in litigation.

The United States Supreme Court has held that improper comments in closing arguments risk opening the door to the court allowing improper comments and arguments by opposing counsel. Thus, in a criminal case, when zealous defense counsel improperly interjects such remarks, the court may allow the prosecutor to interject prejudicial remarks to retaliate. Under this “retaliation” or “invited response” doctrine, a prosecutor is permitted to prejudice the defendant’s case with an improper closing argument, and the resulting prejudice is deemed an insufficient basis to reverse the defendant’s conviction because of the provocative conduct of the defendant’s attorney. The court recognizes that in such circumstances both attorneys “crossed the line of permissible conduct established by ethical rules of the legal profession,” but emphasizes that the prosecutor’s prejudicial remarks are a reasonable response to defense counsel’s “opening salvo.” *United States v. Young*, 470 U.S. 1, 14 (1985).

4. Frivolous Advocacy

Rule 3.1 states, in relevant part, that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous which includes a good faith argument for an extension, modification or reversal of existing law.” “Frivolous advocacy inflicts distress, wastes time, and causes increased expense to the tribunal and adversaries and may achieve results for a client that are unjust.” *Restatement (Third) of the Law Governing Lawyers* § 110 cmt. b. See also *FRCP 11* (prohibiting frivolous pleadings).

Rule 3.4 states in relevant part that “a lawyer shall not . . . (d) in pretrial procedure make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request for an opposing party.” Likewise, Rule 4.4 also states that “a lawyer shall not use means that have no substantial purpose other than to enhance delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person.” See also *Restatement (Third) of the Law Governing Lawyers* § 110. Violations of Rules 3.4 and 4.4 constitute frivolous conduct under Rule 3.1. Note also, that Rule 3.4(d) prohibits frivolous pretrial discovery requests

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or objections, and Rule 3.2 compels attorneys to use reasonable efforts to expedite litigation. *See 28 USC § 1927 and FRCP 23 (g)(3) in accord.*

In asserting a position in litigation, the Rules limit the lawyer from knowingly asserting a frivolous claim or defense. If, however, there is a good faith basis in law or fact for asserting a good faith argument for modifications or reversal of existing law, the conduct is not frivolous. *Rule 3.1.* However, where the highest court of a state has recently reexamined a legal principal and again adhered to its precedent, then a claim within months attempting to challenge the precedent probably is frivolous. *Restatement (Third) of the Law Governing Lawyers § 110, ill.1.*

Under Fed. R. Civ. Pro. 11(b)(2), a lawyer signing a pleading or motion warrants that the claim, defense or other contention is warranted by existing law or by a nonfrivolous argument for extending, modifying or reversal of existing law or for the purpose of establishing new law. Here, under Fed. R. Civ. Pro. Rule 11(c)(5)(A), if this rule is violated, the court may not impose monetary sanctions against a client, but only on the lawyer.

Under the Federal Rules of Civil Procedure, which is tested on the MPRE, an attorney is required to sign all documents submitted to a court. The attorney's signature certifies that there is, or likely will be, "evidentiary support" for the allegations contained in the document. *FRCP 11(b).* Federal Rule 11 requires attorneys to conduct a reasonable inquiry into the legal and factual merits of the allegations contained in the document. Rule 11 and Model Rule 3.1 are analogous and both are measured by an objective standard.

Rule 11 provides for a "safe harbor" allowing the attorney 21 days from service on the attorney of papers seeking sanctions for frivolous conduct to amend or withdraw a filed offending document before the Rule 11(c) motion for sanction against the attorney can proceed. *FRCP 11(c)(1)(A).*

Even if convinced that the guilt of the offense charged can be proven beyond a reasonable doubt, a criminal defense lawyer may require the prosecution to prove every element of the offense, including those elements as to which the lawyer knows the accused can present no effective defense. The lawyer may take any step required or permitted by the constitutional guarantee of the effective assistance of counsel. *Restatement (Third) of the Law Governing Lawyers § 110 cmt. f.* "The lawyer's obligations under [Rule 3.1] are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited [as frivolous] by this Rule." *Rule 3.1 cmt. 3.*

5. Disclosure of Legal Authority

Pursuant to Rule 3.3, an attorney has an affirmative duty to disclose to the tribunal adverse legal authority (statutes or cases) not known to or presented by opposing counsel, but only if the authority is squarely contrary to the client's position and from the jurisdiction where the court is sitting. This Rule applies to a decision directly adverse to any proposition of law on which the lawyer expressly relies that can reasonably be considered important by the judge sitting on the case. Keep in mind, however, that even though an attorney is aware that there is contrary authority in State X, the attorney has no duty to disclose it to a judge in State Y. *Restatement (Third) of the Law Governing Lawyers § 111(2); Hendrix v. Page, 986 F.2d 195 (7th Cir. 1993); Katris v. Immigration & Naturalization Serv., 562 F.2d 866 (2d Cir. 1977).* Adverse legal authority "[o]rdinarily ... does not include decisions of courts of coordinate jurisdiction. In a federal district court, for example, a discussion of another district court or the court of appeals from another circuit would not ordinarily

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be considered authority from the controlling jurisdiction by the sitting tribunal.” *Restatement (Third) of the Law Governing Lawyers* § 111 cmt. d.

Once the contrary authority has been presented to the court, it is the attorney’s function and duty to question its validity under the present facts, to challenge the holding, or to distinguish it.

EXAMPLE:

Several months after the court denied the defendant’s motion to dismiss, the plaintiff’s lawyer uncovered an appellate court decision from another part of the state interpreting the statute favorably for the defendant’s earlier motion. The appellate decision, which controls all trial courts beneath it, can be interpreted two ways, one of which is directly contrary to the holding of the trial court denying the motion to dismiss.

Here, the plaintiff’s attorney must promptly disclose the recent decision to the court because the decision is controlling and the action is still pending. Rule 3.3 provides that the duty of disclosure continues “to the conclusion of the proceeding.” See *Seidman v. American Express Co.*, 523 F. Supp. 1107 (E.D. Pa. 1981); A.B.A. *Informal Op.* 84-1505 (1984).

The clearest case of an ethical violation is where the attorney knowingly makes a misstatement of law or fact to a tribunal (Rule 3.3(a)) or to others (Rule 4.1). When a lawyer cites any legal authority to a court (favorable or not), the lawyer may not misquote its language and must advise the court when the lawyer knows or learns that the cited authority has been repealed, overruled, narrowed or declared unconstitutional. Failure to do so amounts to a violation of Rule 3.3(a)(1), which prohibits a lawyer from knowingly making a false statement of fact or law to a tribunal or failing to correct a false statement of material fact or law made to a tribunal by the lawyer. Consequently, the attorney who discovers that an earlier statement was inaccurate or false may not sit idly by, for such silence would amount to a misrepresentation. Likewise, an attorney may not give an opinion letter which declares only favorable facts while ignoring other material adverse facts. Keep in mind, however, that a lawyer generally has no affirmative duty to disclose or inform third persons of relevant *facts*.

However, Rule 3.3 imposes an affirmative remedial duty to apprise the court of material facts or the misrepresentation thereof if a failure to do so would assist in a fraud upon the court. *Rule 3.3(b)*. In a criminal or civil case, a lawyer has an obligation to disclose a known fraud upon a tribunal (Rule 3.3(a)(3) and Rule 3.3(b)), even if doing so requires disclosure of confidences and secrets that are otherwise protected. *Rules 1.6 & 3.3(c)*; A.B.A. *Formal Op.* 87-353 (1987); *Nix v. Whiteside*, 475 U.S. 157 (1986).

If a client insists on committing perjury, the attorney first must seek to persuade the client not to do so and, if that fails, seek to withdraw from the case. *Rule 3.3 cmt. 10*. If withdrawal is not possible, or will not undue the effects of the perjury if it has occurred, then “the advocate should make disclosure to the court to prevent the lawyer from participating in a fraud on the Court.” A.B.A. *Formal Op.* 87- 353 (1987).

6. Advocacy in *Ex Parte* Proceedings

In addition to the requirement of presenting known *legal* authority directly adverse to a lawyer's client's position, a lawyer is required to inform the court in an ex parte proceeding of all favorable or adverse material *facts* known to the lawyer that will enable the tribunal to make an informed decision. *Rule 3.3(d)*. A grand jury proceeding, however, is not considered an ex parte proceeding. *Ronald D. Rotunda, Legal Ethics § 3.8 p.898 (2015-2016)*.

Thus, in an ex parte motion for, e.g., a provisional remedy, a default judgment, or a petition for child custody or to involuntarily civilly commit a person for a mental disease, the lawyer for the moving party is ethically bound to disclose all known material facts even if they are unfavorable to the lawyer's position.

7. Communicating with the Judiciary

An attorney may not engage in ex parte communications, whether written or oral, with a judge, whether initiated by the lawyer or the judge, regarding the *merits* of a matter pending before that judge or an impending matter that will be brought before that judge. A copy of all writings sent to the judge must be delivered promptly to opposing counsel or to the adverse party if that party is not represented by counsel. Any oral communication by a lawyer with a judge should be made only upon proper notice to opposing counsel or the opposing party. *Rule 3.5(b)*.

The reader should be aware that the CJC section 3B(7) permits a judge to consider ex parte communications for scheduling, administrative purposes, or for emergencies that do not deal with substantive matters or issues on the merits. The judge must reasonably believe that no party will gain a procedural advantage as a result of the ex parte conversation, and the judge must ensure that all other parties are promptly notified of the communication. *See, infra, Chapter XI; CJC Canon 2(a)(3)*.

8. Lawyer's Communication with Jurors

Before a jury is selected, a lawyer connected with the case shall not communicate with or cause another (e.g., an attorney's employee or a private investigator hired by the attorney) to communicate with anyone who the lawyer knows to be a member of the venire from which the jury will be selected. *Rule 3.5(a); Restatement (Third) of the Law Governing Lawyers § 115*.

"[A]lmost ninety percent of state courts give attorneys access to prospective jurors' names prior to the trial. *29 Geo. J. Legal Ethics, 867, 871 (2016)*. In obtaining information about potential jurors, any public records found in the courthouse, newspapers, publications, and voting records are available to an attorney for use. Reviewing these records is not considered a direct or an indirect communication with a jury member. Any investigation of prospective jurors through discussions with neighbors, business associates, friends, and acquaintances, although indirect and permissible, should be handled with great care.

In *U.S. v. Warlick*, lawyers who hired an investigator to directly contact members of a jury panel and who used the information obtained to strike members of the panel were found to have obstructed the administration of justice in violation of Rule 3.5. *742 F.2d 113 (4th Cir. 1984)*. The two attorneys were publicly reprimanded. *In re Two Anonymous Members of South Carolina Bar, 298 S.E.2d 450 (1982)*.

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Once the jury is selected, no lawyer may communicate with or cause another to communicate ex parte with a member of the jury, unless authorized to do so by law or court order. *Rules 3.5(b) and 4.4(a)*.

Improper contact with a juror would also arise if the lawyer sends a juror a “friend” email request or a request to connect on LinkedIn, or to follow a juror on “Twitter.”

Note, however, in voir dire phase of the trial, New Jersey has sanctioned the use of Google of potential jurors during voir dire. *Carino v. Muenzeu*, 2010 N.J. Super. Unpub. Lexis 2154 (N.J. Super. Ct. App. Div. 2010). A Missouri decision suggests that lawyers may have a duty to perform research on a juror’s background prior to trial. *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010). The ABA agrees. In a formal opinion it declined to sanction a lawyer reviewing a juror’s social media site throughout the trial even if the juror is aware of this passive review by the lawyer since this is not communicating with the juror. *ABA Formal Opinion*, 466. “There is a strong public interest in identifying who might be tainted by improper bias or prejudice.” *Id.* Other state bar associations do not agree on this when the juror is aware that the lawyer is browsing.

After the jury has been discharged, the lawyer may have discussions with the jury provided they are not vexatious, harassing, or embarrassing, or made to influence the discharged juror in future jury service. *Rule 3.5(c)*. Thus, it is not unethical, in states where it is permissible, for a lawyer to communicate with a juror in an informal manner after trial for the purpose of self-education when the juror is willing to speak with the lawyer. New York State allows such communications, but New Jersey, Massachusetts, New Hampshire, Louisiana, and Oregon, as well as 94 federal districts around the country, prohibit post-trial discussions with jurors.

Indeed, Rule 3.5(c) says that if a lawyer desires to communicate with a juror after the jury has been discharged, the lawyer may do so unless:

1. the communication is prohibited by law or court order;
 2. the juror has made known to the lawyer a desire not to communicate; or
 3. the communication involves misrepresentation, coercion, duress, or harassment.
- Rule 3.5(c)*.

9. Advocates and Evidence

a. Interviewing and Preparing Witnesses

The prohibition against contacting adverse parties does not apply to fact witnesses who may have relevant information. Accordingly, an attorney may interview any party’s witnesses in preparation for trial. *IBM v. Edelstein*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 979 (1974).

A lawyer shall not unlawfully obstruct another party’s access to evidence. *Rule 3.4(a)*. Lawyers are thus prohibited from inducing a witness to evade service of a subpoena. *In re Holmes*, 193 Cal. Rptr. 790 (Cal. Ct. App. 1983). For example, a lawyer may be disciplined for directing a client to leave the courthouse so as to become unavailable to testify. *In Matter of Geron*, 486 N.E.2d 514 (Ind. 1985). “A lawyer may not attempt to induce a witness to ignore a subpoena or similar order to appear [at a pretrial deposition or at trial] for testimony, or counsel the witness to

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evade service of the order, as by leaving the jurisdiction or hiding out” *Id.* (citing *Restatement (Third) of the Law Governing Lawyers* § 116 cmt. d). The court pointed to the Restatement, noting that:

Under Rule 3.4(f), a lawyer shall not request that a witness, other than a client, refrain from voluntarily giving relevant information to another party or attorney unless:

1. the witness is a relative, employee or agent of a client, and
2. the lawyer, in giving such advice to the witness, reasonably believes that the witness’s interests will not be adversely affected by refraining from giving such information -- e.g., that the witness will not be held in contempt.

Note that Rule 8.4(b) or (d) also may be violated if the lawyer’s advice is illegal or obstructs or prejudices the administration of justice -- e.g., urging a nonparty-witness not to cooperate with a federal investigation. *See generally, infra., Chapter IX. G. (Communicating With Witnesses).*

b. Compensating Witnesses

Rule 3.4(b) prohibits offering inducements “prohibited by law” to a witness for that witness’s testimony. *Rule 3.4(b)*. However, a witness may be compensated for the reasonable value of the witness’s time expended while preparing for or giving testimony at a deposition or a trial. *Rule 3.4 cmt. 3*. Such payments do not violate the prohibition against bribing witnesses for their testimony.

The American Bar Association Standing Committee on Ethics and Professional Responsibility has approved payments to fact witnesses for expenses incurred for the following time spent:

1. in researching records that are germane to that witnesses’ testimony;
2. in pretrial interviews as long as the lawyer makes it clear to the witnesses that the payment is not being made for the substance (or efficacy) of the witnesses’ testimony or as an inducement to “tell the truth”; and
3. while preparing for and giving testimony.

Before a lawyer approves reimbursement for lost wages or income, the witness must represent to the lawyer an actual loss and a reasonable explanation of how the amount of the loss was calculated. *A.B.A. Formal Op. 96-402 (1996)*. This calculation may include reimbursement for the witness’s out of pocket expenses for child care, meals, lost wages, travel, lodging, etc.

Even though the witness has in fact not lost any wages, e.g., a non-working or retired witness, that witness may nevertheless be compensated (not rewarded) for the reasonable quantum meruit value of the witness’s time. In the absence of an actual financial loss by the witness, such payment has the earmarks of a “fee” or inducement prohibited by Rule 3.4, and, thus, the lawyer should be careful to apply objective reasonableness. Thus, if an important and critical fact witness said she would not appear unless paid \$750, the lawyer could be subject to discipline for paying that sum without an accounting from the witness for the actual costs incurred by the witness.

Coming close to the line was the New York payment to a doctor, fact witness, who was paid \$10,000, not the CPLR 8001 \$15 fee, for coming in to court to testify that he made an emergency

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room business entry showing that the injured plaintiff made a damaging admission that she fell over her dog, and not the uneven road surface. *Caldwell v. Cablevision*, 20 N.Y.3d 372 (2013).

A lawyer may also pay a reasonable fee for the professional services of an expert witness but may not pay the expert a contingent fee dependent on the outcome of the case. *Rule 3.4(b) (prohibiting such inducements to witnesses)*; *Rule 3.4 cmt. 3*; *Restatement (Third) of the Law Governing Lawyers* § 117.

c. Obstructing Access to Evidence

It is unlawful to obstruct another party's access to evidence by destroying or concealing that evidence. Rule 3.4 states that a lawyer shall not unlawfully obstruct another party's access to evidence or counsel or assist another to do such act. *Rule 3.4(a)*. Likewise, a lawyer shall not falsify evidence (e.g., forge, backdate or alter a document, or falsely notarize a signature of an absent person). *Rule 3.4(b)*.

Under the Model Penal Code, the crime of "tampering," arises when one believes an official proceeding or investigation is about to begin and that person attempts to or induces a witness or informant to withhold, alter, destroy, conceal or remove any record, document, testimony or thing with purpose to impair its verity or availability in such proceeding or investigation. *Model Penal Code* 241.6 (2004); *see generally, supra, Chapter III. C. 8. (Evidence of Past Crimes)*. Tampering rises to a third degree felony if the "actor employs force, deception, threat or offer of pecuniary benefit." *Model Penal Code* 241.6 (1)(3) (2004).

CHAPTER VII

DIFFERENT ROLES OF A LAWYER

A. LAWYER AS AN ADVISOR

A principal role of a lawyer is to render legal advice to a client (i.e., to explain the law, its limits, and possible challenges to existing law). To effectively advise a client, a lawyer often must explore relevant nonlegal issues. Restatement (Third) of the Law Governing Lawyers § 94(3) provides that in counseling a client, a lawyer “may address nonlegal aspects of a proposed course of conduct, including moral, reputational, economic, social, political, and business aspects.” *See also Rule 2.1.*

In advising a client, “[a] lawyer shall not counsel a client to engage, or assist a client [(e.g., by preparing documents or negotiating on behalf of the client)], in conduct that the lawyer knows is criminal or fraudulent” *Rule 1.2(d)*. The lawyer may become an aider and abettor (an accomplice) if he or she advises a client as to the best means of engaging in illegal conduct (e.g., how to import contraband or illegal aliens without being caught, how to set up duplicate books for illegal tax avoidance, or how to conceal cash that has not been declared to the Internal Revenue Service). Along the same lines, a lawyer clearly cannot aid the client in ongoing or anticipated conduct that is fraudulent or illegal. A lawyer may, however, explain what conduct is legal and when conduct crosses the line and becomes illegal, as well as the consequences associated with illegal conduct. *Id.* Note that “[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.” *Rule 1.2 cmt. 9.*

While a lawyer may be disappointed by a judge’s order adversely affecting a client’s interests, the lawyer may not advise a client to disregard or disobey a court order. *Rule 1.2(d)*. Such advice violates *Rule 1.2(d)*, and is also prejudicial to the administration of justice. *Rule 8.4(d)*. To preserve an issue for appeal, however, a lawyer may advise a client not to answer a question, even when ordered to do so by a court, to preserve the client’s right against self-incrimination. *Maness v. Meyers, 419 U.S. 449 (1975)*. In this case, the lawyer’s objection is made solely to protect the client’s right against self-incrimination; if the client answers, the answer will render the issue moot under state law.

As discussed in the previous Chapter, *Rule 3.4* and Restatement (Third) of the Law Governing Lawyers § 118 provide that a lawyer shall not, and shall not expressly or impliedly advise a client to, “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.” *Rule 3.4(a)*.

B. LAWYER AS A THIRD-PARTY NEUTRAL

Alternative dispute resolution has become increasingly popular in the twenty-first century. When a lawyer is asked to represent two or more persons with conflicting interests who are not the lawyer’s clients, the lawyer may act as a third-party neutral, e.g., an arbitrator or mediator. *Rule 2.4(a)*. In order to act as such, the lawyer must make clear that the lawyer is not representing either

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party. *Rule 2.4(b)*. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, it is incumbent upon the lawyer to clarify it. *Id.*

A former judge, arbitrator, mediator, or other third-party neutral is precluded from representing a client in a matter in which he or she personally and substantially participated while a judge, arbitrator, mediator, or third-party neutral (or the law clerk to such a person), unless all parties to that proceeding give informed consent, confirmed in writing. *Rule 1.12(a)*. Nevertheless, other lawyers in their law firms may represent such clients, provided the former judge, arbitrator, mediator, or third-party neutral is "screened." *Rule 1.12(c)(1)*; see also *Rule 1.0(k)* (defining "screen[ing]" as "isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law"). However, an arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party. *Rule 1.12(d)*.

Mediators, third-party neutrals, judges, and arbitrators are prohibited from negotiating for employment with any "party or [party's lawyer] in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral." *Rule 1.12(b)*. However, *Rule 1.12(b)* provides that a lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or party's lawyer in such a matter, but only after the law clerk notifies the judge or adjudicative officer.

C. LAWYER AS AN EVALUATOR

We know that a lawyer cannot always be a clairvoyant, but the lawyer is required to evaluate the appropriateness, validity, and merits of the lawyer's client's claims, defenses, and/or transactions.

1. Evaluating the Client's Case or Defense

The lawyer may not assert for the client a claim or defense unless there is a basis for doing so under existing law. *Rule 3.1*. An exception to this general rule arises when a lawyer represents a defendant in a criminal or civil case that could result in incarceration. In such an instance, the lawyer may defend the proceeding so as to require that each element of the crime be established by the prosecution. *Id.*

An action is not frivolous merely because the lawyer has evaluated it and believes the client's position will not prevail. *Rule 3.1 cmt. 2*. The action is frivolous, however, if the lawyer is unable to make a good faith argument on the merits of the action taken, or to support the action by a good faith argument for an extension, modification, or reversal of existing law. *Id.*

2. Third Party Opinion Letter

In some business transactions, an attorney is called upon to evaluate the transaction and provide a legal opinion letter to a third party (e.g., a bank) or an opposing party on such issues as the client's authority to undertake certain transactions, the valid corporate status of a corporate party, the validity of a lien search of real property, or a transaction's compliance with existing laws (e.g., tax or securities laws).

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The Rules state that a lawyer may undertake an evaluation of the client's affairs for use and reliance by a third person, if the lawyer reasonably believes that making the evaluation is not incompatible with other aspects of the lawyer-client relationship. *Rule 2.3(a)*. However, if the lawyer knows or reasonably should know that the evaluation is "likely to affect the client's interests materially and adversely," the lawyer "shall not" provide the evaluation unless the client gives informed consent. *Rule 2.3(b)*; *see also Rules 1.6(a) (governing confidentiality) & 1.0(e) (defining "informed consent")*. The client's informed consent is essential because, by disclosing confidential information in an evaluation, the attorney-client privilege is waived.

These third person opinions, if negligently or fraudulently prepared, can give rise to civil liability for a lawyer under a claim by the nonclient third party for negligent misrepresentation, fraud, or legal malpractice. If the evaluation is limited by time constraint or access to the underlying information is limited, then the lawyer's evaluation must disclose that fact.

D. LAWYER AS A NEGOTIATOR

A lawyer's role as a negotiator is of critical importance to the lawyer's client. In the course of representing a client, a lawyer may be called upon to negotiate a settlement in a civil suit, plea bargain in a criminal case, or business transaction for the sale, lease, or exchange of property.

The Preamble to the Rules states that "[a]s a negotiator, a lawyer seeks results advantageous to the client but consistent with the requirements of honest dealings with others."

In negotiating for a client, the lawyer must be careful not to:

1. Reveal confidential information relating to the representation, unless the client consents or such disclosure is impliedly authorized in order to carry out the representation, pursuant to Rule 1.6(a) (but note the exceptions provided in Rule 1.6(b), which authorize the disclosure of confidential information in certain extremely limited circumstances);
2. Knowingly make a false statement of material fact or false statement of law to a third person, or knowingly fail to disclose a material fact when disclosure is necessary to avoid assisting a client in committing a criminal or fraudulent act (unless disclosure is prohibited by Rule 1.6), pursuant to Rule 4.1; or
3. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, pursuant to Rule 8.4(c).

QUERY:

Can a lawyer ethically negotiate a civil settlement without advising the lawyer's adversary that the client's claim is now barred by the statute of limitations?

ANSWER:

Yes. "As a general matter, the Model Rules . . . do not require a lawyer to disclose weakness in her client's case to an opposing party in the context of settlement negotiations or otherwise. Indeed, the lawyer who volunteers such information without her client's consent would likely be violating her ethical obligation to

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represent her client diligently, and possibly her obligation to keep client confidences. . . . By the same token, a lawyer may not ethically break off negotiations with an opposing party simply because she has doubts about the viability of her client's case, unless, of course, the client directs her to do so." *A.B.A. Formal Op. 94-387 (1994)*.

If prelitigation negotiations fail, the lawyer may even ethically assert the time-barred claim. "A time-barred claim may still be enforced by a court, and will be if the opposing party raises no objection [A] failure by plaintiff's counsel to call attention to the expiration of the limitation period cannot be characterized either as the filing of a frivolous claim in violation of Rule 3.1, or a failure of candor toward a tribunal in violation of Rule 3.3. As long as the lawyer makes no misrepresentation in pleadings or orally to the court or opposing counsel, she has breached no ethical duty towards either." *Id.*

Rule 4.1 prohibits lawyers from making false statements of material fact or failing to disclose material facts when disclosure is necessary to avoid facilitating a criminal or fraudulent act by a client. However, in negotiations, false estimates of price or value of the subject of a transaction, or a party's ranges of acceptable settlements are not considered statements of material fact to which Rule 4.1 applies. *Rule 4.1 cmt. 2; see A.B.A. Formal Op. 06-439 (2006). See Chap. I(E) supra.*

Note that a lawyer cannot engage in misrepresentations to the court, but the client's true settlement goals are privileged and the lawyer cannot reveal them. As such, the judge should not require the lawyer's disclosure of these amounts. *A.B.A. Formal Op. 93-370 (1993)*.

E. LAWYER AS A PUBLIC SERVANT

1. Government Prosecutors

A prosecutor, as an attorney, must adhere to the general ethical rules governing lawyers, and, thus, must not make misleading or inaccurate statements to an accused. *Rule 4.1*. The Rules provide that a prosecutor shall be truthful to the court (Rule 3.3(a)(1)), adhere to restrictions pertaining to trial publicity (Rules 3.6 and 3.8(f)) and trial decorum (Rule 3.5), and comply with rules concerning communications with defendants represented by counsel (Rule 4.2). Likewise, the prosecutor must exercise "reasonable care" to prevent members of his or her staff and law enforcement personnel assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making. *Rules 3.6 & 3.8(f)*.

Under the Citizens Protection Act (28 U.S.C. § 530B (a) [2008]), referred to as the McDade Amendment, Congress mandated that federal prosecutors be subject to the same rules of ethics "to the same extent and in the same manner as other attorneys" in the states where they practice. In the Act, the U.S. Attorney General was to promulgate rules to assure compliance. Such rules were promulgated but severely limited the scope of this act. *28 C.F.R. § 77 (2008); Megan Browdie & Wei Xiang, Current Development 2008-2009: Chevron Protects Citizens: Reviving the Citizens Protection Act, 22 Geo. J. Legal Ethics 695 (2009)*.

Still to be resolved, is whether federal prosecutors have to comply with state courts' interpretation of the ethics rules. For example, if a state says it is unethical for a prosecutor to have a criminal defendant waive the ineffective assistance of counsel defense in a plea agreement, but

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federal courts and federal criminal procedure allow such waivers. What law governs? *See United States v. Ky. Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014).

The government prosecutor must:

1. Prosecute only where there exists probable cause. *Rule 3.8(a)*. A prosecutor may not use his or her position or the economic power of the government to harass suspects or defendants, offer unjust settlements, or commence criminal proceedings in the absence of probable cause.
2. Timely disclose all material evidence or information that the prosecutor possesses or otherwise knows about that would negate the guilt of the accused, reduce the severity of the crime charged, or reduce the punishment (“except when the prosecutor is relieved of this responsibility by a protective order of the tribunal”). *Rule 3.8(d)*; *Brady v. Maryland*, 373 U.S. 83 (1963); *People v. Williams*, 7 N.Y.3d 15 (2006). The prosecutor’s “possession” extends beyond the federal prosecutor’s own files to other federal agencies, such as findings occurring during the Securities and Exchange Commissioner’s civil investigation. *See United States v. Reyes*, 577 F.3d 1069, 1078 (9th Cir. 2009); *cf. United States v. Zagari*, 111 F.3d 307, 320 n.13 (2d Cir. 1997) (noting that “the extent to which knowledge may be imputed from one federal investigative agency to another for Brady purposes is as yet unclear”). In *Brady*, the U.S. Supreme Court held that a prosecutor violates a criminal defendant’s due process rights whenever evidence is withheld that is “material either to guilt or punishment” *Brady*, 373 U.S. at 87. Evidence is exculpatory and subject to disclosure if it exonerates the accused or points to the innocence of the accused. An affirmative duty is imposed upon a prosecutor to disclose to defense counsel in a criminal proceeding any exculpatory material information or evidence which tends to negate the defendant’s guilt or mitigate the offense and its resulting punishment. *Id.*; *Rule 3.8(d)*. The test of “materiality” for *Brady* (which Rule 3.8(d) does not require) is whether there is a reasonable probability that disclosure would have led to a different outcome at the trial if it had been disclosed by the prosecutor to defense counsel. “In particular, Rule 3.8(d) is more demanding than the constitutional case law [*Brady*], in that it requires disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial’s outcome.” *A.B.A. Formal Op. 09-454* (2009).

EXAMPLE:

Prosecutors must not elicit and must correct knowingly inaccurate, false, or mistaken material testimony of a prosecution witness. The prosecutor’s failure in this regard requires a new trial for the accused unless there is no reasonable possibility that the error contributed to the conviction. *People v. Colon*, 13 N.Y.3d 343 (2009).

The Supreme Court has held that evidence that could be used to impeach prosecution witnesses falls within *Brady* exculpatory material. *United States v. Bagley*, 473 U.S. 667 (1985). Thus, in the interests of protecting a defendant’s due process rights, a new trial will be ordered if the prosecutor fails to disclose a plea agreement between a prosecutor and a prosecution witness. *Giglio v. United States*, 405 U.S. 150, 155 (1972). “Prosecutors must turn over not only

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evidence that is considered exculpatory but also evidence that can be used for impeachment of the government witnesses.” *Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility* § 3.8-2(c) at 904 (2015-2016).

EXAMPLE:

The prosecutor must disclose evidence that the convicted defendant’s accomplice confessed to the homicide, for this information would tend to reduce the sentence to be imposed on the defendant under the sentencing guidelines. Also, the prosecutor is required to disclose at the trial that several eyewitnesses to the crime were unable to identify the defendant in a lineup.

EXAMPLE:

The prosecutor must disclose that a crime victim’s description of the perpetrator did not match the defendant.

EXAMPLE:

The prosecutor must disclose that the crime victim initially picked someone else in a line up, and, only after speaking with detectives thereafter, selected the defendant.

The *Brady* duty is excused if *Brady* disclosure to the defendant could result in substantial harm to an individual (such as a law enforcement officer working undercover) or to the public as long as the prosecutor is granted an appropriate protective order from a tribunal. *Rule 3.8(d); Rule 3.8 cmt. 3.*

A.B.A. Formal Opinion 09-454 (2009) notes that Rule 3.8(d) does not merely codify the *Brady* due process obligation of prosecutors, but, rather, requires disclosure of all information known to the prosecutor that *Brady* may not require to be disclosed (i.e., exculpatory evidence outside the prosecutor’s files and outside that possessed by the “prosecution team”).

The A.B.A. opinion declined to impose a duty on prosecutors to undertake an investigation in search of exculpatory evidence. Rule 3.8(d)’s disclosure requirements for prosecutors are further buttressed by Rule 3.4(a), which ethically prohibits a lawyer (criminal or civil) from impeding another party’s access to evidence or concealing evidence. Further, Rule 3.4(d) requires lawyers (including prosecutors) to make reasonably diligent efforts to comply with opposing counsel’s discovery requests.

3. Make reasonable efforts to assure that the accused has been advised of the right to counsel and has been given a reasonable opportunity to obtain counsel. *Rule 3.8(b)*. Thus, after a defendant has been arrested and is awaiting arraignment in court, the District Attorney ethically cannot question the defendant in the defendant’s holding cell without first advising the defendant of his *Miranda* rights.

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4. Refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused, except the prosecutor may inform the public of the nature and extent of the prosecutor's actions and make other statements that serve a legitimate law enforcement purpose. *Rule 3.8(f)*.
5. Exercise reasonable care to prevent employees, law enforcement personnel and investigators from making extra judicial statements in violation of Rules 3.6 and 3.8(f).
6. Not seek to obtain, from an unrepresented accused, a waiver of important pretrial rights, such as the right to a preliminary hearing. *Rule 3.8(c)*.
7. Disclose to the court, after the criminal defendant is convicted, that the prosecutor knows of new, credible evidence that creates a reasonable likelihood that the defendant was wrongly convicted. *Rule 3.8(g)*. If the conviction was obtained outside the prosecutor's jurisdiction, the prosecutor must disclose this to the court or to a proper authority such as the chief prosecutor of that jurisdiction. *Rule 3.8(g)(1)*. If the prior conviction was obtained in prosecutor's own jurisdiction, then the prosecutor has the additional burden of investigating the defendant's innocence further, promptly notifying the court, and, absent a court ordered delay, notifying the convicted defendant. *Rule 3.8(g)(2); Rule 3.8 cmt. 7*. Once the prosecutor knows by clear and convincing evidence that the defendant did not commit the crime for which he was convicted, an ethical burden is placed on the prosecutor to take necessary steps to remedy the conviction, (e.g., advising the court and seeking the court appointment of pro bono counsel for an indigent defendant). *Rule 3.8(h)*. Note that a prosecutor's good faith, independent judgment that the new evidence is not of such a nature as to trigger the obligations under Rule 3.8(g) will not violate the Rule, even if it later turns out the prosecutor was wrong. *Rule 3.8 cmt. 9*.

In addition, as discussed earlier in this volume, a prosecutor may not interfere with defense counsel's access to witnesses. *Rule 3.4(a) and (f)*. The prosecutor's trial conduct must comply with Rule 3.4. Thus, a prosecutor, like any other attorney, may not:

1. Refer to evidence the lawyer does not reasonably believe is relevant or admissible, or
2. Assert personal knowledge, belief, or opinion as to guilt of the criminal defendant or credibility of witnesses. *Rule 3.4(e)*.

EXAMPLE:

It was improper for an attorney to vouch for two witnesses who worked for the corrections department in his closing statement by stating, "Colter and Lee, both honorably discharged from military service before their long service with the CDCR, have much to lose. A conviction for perjury would end Lee's career. And a conviction for perjury would—could possibly result in a prison term for both of them if they committed perjury." *Draper v. Rosario*, 836 F.3d 1072, 1085 (9th Cir. 2016).

It is improper for a prosecutor to penalize a defendant for exercising his or her Sixth Amendment right to counsel by stating or implying that retention of an attorney is an indication of the defendant's guilt. *Angel v. Overberg*, 664 F.2d 1052 (6th Cir. 1981); *United States v. McDonald*, 620 F.2d 559 (5th Cir. 1980). In *McDonald*, a fruitless search of the defendant's home

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was conducted while his attorney was present. After the defendant introduced evidence at the trial that the search produced no inculpatory evidence, the prosecutor, in closing arguments, suggested that the retention of defense counsel and counsel's presence at the search was indicative of the defendant's guilt. The court reversed the defendant's conviction, holding that such imputation not only violated the defendant's right to a fair trial, but also violated the defendant's right to counsel.

"It is improper for the prosecution to vouch for the credibility of a government witness." *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980), cert. denied, 452 U.S. 942 (1981). Improper vouching may occur in two ways: when the prosecution (1) places the prestige of the government behind the witness, or (2) indicates that information not presented to the jury (e.g., a witness was not called) supports the government's witness's testimony.

A prosecutor's stated personal conclusion that the defendant is guilty also is improper. *Rule 3.4(e)*; *United States v. Rios*, 611 F.2d 1335, 1342 (10th Cir. 1979), cert. denied, 452 U.S. 918 (1981). In *United States v. Garza*, 608 F.2d 659, 664-65 (5th Cir. 1979), the prosecutor improperly commented that he would "quit" before sending an innocent person to prison. Additionally, the prosecutor personally vouched for the prosecution witness's motives and integrity. The Fifth Circuit called the prosecutor's argument "[a] textbook example[] of what a closing argument should not be" and labeled such conduct "pernicious."

EXAMPLE:

In the infamous Duke lacrosse rape case, the North Carolina Bar Association disbarred the prosecutor, for the following misconduct:

1. Making public statements having a substantial likelihood of heightening public condemnation of the accused parties, e.g., stating that the players were "a bunch of hooligans" and giving his personal opinion that a rape had occurred.
2. Making public statements that were misleading, deceptive, and fraudulent, e.g., when the DNA evidence failed to connect any of the lacrosse players to the rape, the prosecutor stated to the press that the players must have used condoms, even though the nurse at the hospital told him that condoms were not used in the attack.
3. Even when he knew the DNA evidence did not match any of the Duke players, the prosecutor failed for months to turn over this exculpatory evidence.

QUERY:

Is the prosecutor in the Duke lacrosse rape case civilly liable to the defendant? No. Just like judges and legislators, prosecutors are immune from civil litigation for prosecutorial misconduct no matter how egregious. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

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2. Prosecutor's Subpoena of an Attorney

To avoid unnecessary intrusions into the attorney-client relationship, Rule 3.8(e) prohibits a prosecutor from issuing to an attorney a grand jury or other criminal proceeding subpoena involving that attorney's current or former client's past crimes, unless the prosecutor reasonably believes:

1. the information sought is not protected by any privilege (Rule 3.8(e)(1));
2. the information sought is essential to an ongoing investigation or prosecution (Rule 3.8(e)(2)); and
3. there is no other feasible alternative to obtain the information (Rule 3.8(e)(3)).

When an attorney's client files are subpoenaed, the attorney has an ethical obligation to limit or oppose the subpoena or court order on any legitimate grounds in order to protect documents that are subject to confidentiality. *A.B.A. Formal Op. 94-385 (1994)*.

Rule 1.6, Comment 13, advises a lawyer who is subpoenaed to testify about a client's matter to assert the attorney-client or work product privilege wherever applicable. The attorney, however, must adhere to the final court order on the production of materials. *Rule 1.6 cmt. 12*.

3. Prosecutor's Supervisory Duties

All supervisory lawyers, including those in a prosecutor's office, have an ethical duty to establish office-wide ethical policies to educate, detect and resolve such issues as disclosing to defense counsel exculpatory material, eavesdropping on confidential conversations between the criminal defendant and defense counsel, contacts between represented and unrepresented persons (Rule 4.2 and 4.3), what statements may or may not be made by a prosecutor in closing arguments (Rule 3.4), as well as what unethical conduct by other prosecutors must be reported under Rule 8.3(a). *ABA Formal Op. 467 (2014)*.

F. APPEARANCE BEFORE LEGISLATIVE OR ADMINISTRATIVE BODIES

When a legislative body or administrative agency conducts a hearing to gather facts as a basis for enacting laws or regulations, any attorney appearing before that body who is representing a client must identify himself or herself as an attorney and reveal his or her relationship to the interested client. *Rule 3.9*. In that regard, the lawyer cannot misrepresent the capacity in which the lawyer appears. *Id.*; *Restatement (Third) of the Law Governing Lawyers § 104*.

EXAMPLE:

Mr. Pieper, an attorney appearing at such a hearing, should say: "Good morning, my name is John Pieper. I am an attorney appearing for [client]."

When an individual appears before an administrative agency or legislative body as an attorney, the body will rely on the attorney's integrity and adherence to Rule 3.3 (candor toward the tribunal), Rule 3.4 (fairness to opposing parties and counsel), and Rule 3.5 (impartiality and decorum of the tribunal). The lawyer appearing before a nonadjudicative body should identify the capacity in

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which the lawyer's appearance is made; it can be either on behalf of a client or to further the attorney's own personal interest. *Rule 3.9.*

A lawyer may advocate legislative change on behalf of a client, even though the lawyer does not personally agree with the client's position. Likewise, a lawyer may engage in law reform activity (e.g., tax law, environmental law, etc.) even though the proposed reforms:

1. may harm the interests of the lawyer's present client, or
2. may materially benefit the lawyer's current client, but the lawyer must disclose this fact, but need not disclose the client's identity, to the law reform organization. *Rule 6.4.*

EXAMPLE:

An antitrust lawyer was asked by the bar association to draft recommended legislative changes. Even though these changes would substantially benefit the lawyer's client, the lawyer could properly propose a draft, provided the lawyer advises the bar association that a client of his has an interest in the legislation.

CHAPTER VIII

SAFEKEEPING FUNDS AND PROPERTY

A. CLIENT FUNDS

A lawyer who for any reason receives funds in which a client or third person has an interest shall promptly notify the client or third person. *Rule 1.15(d)*. Except where otherwise permitted by the Rules or an express agreement with the client, the lawyer shall promptly deliver these funds to the client or third person and shall promptly render an accounting upon the client or third person's request. *Rule 1.15(d)*. When the lawyer receives a settlement check in which the lawyer and client both have an interest, the lawyer must deposit it into a lawyer's escrow account, but not into the lawyer's regular law office account. Alternatively, the lawyer may send the settlement check directly to the client for the client to deposit and then bill the client for legal fees or costs owed to the lawyer.

Upon receipt, the lawyer must deposit a client's funds in a separate account maintained within the state in which the lawyer's office is situated, or, with the client or third person's consent, in an account located outside the state. *Rule 1.15(a); A.B.A. Formal Op. 475 (2016)*. The Rules do not require that the account be with a bank. The account, however, must indicate that it contains funds or property belonging to someone other than the lawyer, e.g., "trust account" or "escrow account." The Rules also seek to prohibit a lawyer from commingling the lawyer's private funds with client funds. *Rule 1.15(a)*. The anti-commingling Rule, Rule 1.15(a), seeks to ensure that a lawyer's creditors are not able to attach client funds or property. *Rule 1.15 annot. (2015) (under the heading "Subsection(a): Identifying and Safeguarding Property of Others")*. The Rule also prevents lawyers from shielding their personal assets by hiding them in their clients' trust accounts. *Id.* While Rule 1.15 generally speaks to keeping client and attorney funds separate, Rule 1.15(b) explicitly provides that a lawyer may deposit the lawyer's own funds into a client escrow account "for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose."

The situation may arise when the lawyer must deposit joint funds belonging to both the client and lawyer. These funds should be deposited into the lawyer's separate trust or escrow account, and the lawyer must then promptly draw checks for only those funds indisputably owed to the lawyer and to the client. "For example, a lawyer could not continue to leave earned legal fees in the client trust account for months at a time because this practice constitutes commingling of funds." *Ronald D. Rotunda, Legal Ethics § 1.15-1(a) at 694 (2015-2016)*. If, however, the client disputes the lawyer's right to withdraw all or part of such funds, the lawyer may not withdraw the disputed amount until the disagreement with the client is resolved. *Rule 1.15(e); A.B.A. Formal Op. 475 (2016)*. The undisputed amount "shall be promptly distributed." *Rule 1.15 cmt. 3*. Further, the lawyer "should suggest means for prompt resolution of the dispute, such as arbitration." *Id.*

EXAMPLE:

Attorney Alpha received \$100,000 from an insurance company in settlement of the

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client's personal injury claim. Alpha promptly sent the client a closing statement indicating Alpha's fee as 25% (\$25,000), plus \$20,000 in costs and disbursements for the trial and successful appeal. The closing statement allocated the \$55,000 balance to the client. The client responded that Alpha is not entitled to 25% of the gross recovery (\$100,000), but, rather, is entitled to 25% of the net recovery (\$80,000). What should Alpha do?

First, Alpha should send \$55,000 to the client, pay the \$20,000 in costs and disbursements, and withdraw \$20,000 for Alpha's fee because none of these amounts are disputed. The disputed balance (\$5,000) should remain in the special account, and the rules governing fee disputes should be employed, i.e., the lawyer should amicably attempt to settle and should conscientiously consider mediation or arbitration if available.

EXAMPLE:

Attorney Beta agreed to represent a criminal defendant who sought to be released on bail pending his criminal trial. The defendant's parents came to Beta's office and gave Beta \$4,000 to be used toward the defendant's bail and a \$1,000 retainer for Beta's legal fees. Beta explained that her hourly fee was \$100 per hour.

Beta then spent seven hours working on a written motion and appearing for oral argument before a judge. Despite Beta's efforts, the bail motion was denied. The defendant's parents immediately fired Beta and demanded the return of their \$5,000. What should Beta do?

Beta must return the undisputed amount (\$4,300) and keep the disputed amount (\$700 for the seven hours expended) in her escrow account until the dispute is resolved. She must not withdraw any portion of the \$700 prior to said resolution.

The attorney shall keep and preserve "complete" records of escrow trust and account funds and other property for five years after the representation is terminated. *Rule 1.15(a)*. These records must include receipt and distribution of trust accounts' property, including wire or electronic transfer of funds.

B. CLIENT PROPERTY

A lawyer may be required to take temporary possession of valuable assets owned by a client. For example, a lawyer may have to hold property for the duration of an estate proceeding, an allegedly defective product in a strict products liability case, or documents while a real estate closing or business sale is pending. The lawyer must take careful measures to assure the safety of that property. Specifically, the lawyer should hold the property of others "with the care required of a professional fiduciary." *Rule 1.15 cmt. 1*.

When physical assets come into a lawyer's possession, the lawyer shall:

1. Identify and label any property or securities and place them in a safe deposit box or other place of safekeeping as soon as practical. *Id.*

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2. Notify the appropriate client or third party promptly upon receipt of property or securities. *Rule 1.15(d)*.
3. Promptly deliver property or securities to the client or third party. *Id.*
4. Maintain complete records of all property and securities held for five years after the representation is terminated. *Rule 1.15(a)*.
5. Upon request by the client or appropriate third party, promptly render an accounting. *Rule 1.15(d)*.

A lawyer, as a fiduciary, cannot profit from the administration of an escrow or trust account. All interest or other income earned on a client account belongs to the client or person whose funds or property generated the interest. *N.Y. State 532 (1981); N.Y. State 582 (1987); Nassau County 144 (1988)*.

Today, most states require that lawyers establish IOLTA (Interest on Lawyer Trust Account) plans and deposit trust funds that are too small in amount or are to be held for too short a period of time to generate any significant interest income (e.g., New York suggests funds that will not generate more than \$150 be placed in an IOLTA account). IOLTA plans allow these funds to be pooled and, thus, earn interest. *Rule 1.15 annot. (2015) (under the heading "Interest-Bearing Accounts," subheading "IOLTA")*. The interest earned in IOLTA trust accounts is used for public purposes – usually to fund legal services for indigents. *Id.*

Occasions may arise where a third party, such as a client's creditor, may have a lien on a client's property or money held by the lawyer. The lien may arise by statute (e.g., an I.R.S. or Medicare lien), by order (e.g., a court order of attachment), by money judgment, or by agreement. For example, the lawyer may know that social services or Medicare has a lien on the client's personal injury recovery, or the lawyer may have been served with a restraining notice by a client's judgment creditor prohibiting the distribution of assets to the client until the dispute is decided by court order or agreement. *See Rule 1.15 cmt. 4*. Likewise, while a personal injury action is pending, the plaintiff's doctor or hospital may agree to continue providing medical services if the client consents to paying the medical bills when a recovery ultimately is obtained in the pending lawsuit. *Restatement of Lawyering § 57 cmt. d*. In such instances, the lawyer may not surrender the property or money to the client. *Rule 1.15(e)*. The key here is to determine whether the third party creditor has a legitimate lien against the escrowed funds or simply has a debt claim against the client. Where the lawyer has notice of a lien on a client's recovery, arising by statute or contract, but the lawyer pays out the money to the client without withholding the amount required to cover the lien, the lawyer can be sued personally by the lien holder. *Leon v. Martinez, 193 A.D.2d 788, 789-90 (2d Dep't 1993); Complete Mgmt., Inc. v. Bader, 25 Misc. 3d 1241(A) (Sup. Ct. N.Y. County 2009)*. The lawyer should not assume the role of arbitrator between the client and third party, but the lawyer can commence an interpleader action naming the client and the client's creditor. *Rule 1.15 cmt. 4*. Commencing an interpleader action enables the lawyer to properly distribute the undisputed funds in the lawyer's possession (pursuant to Rule 1.15(e)) and to pay the disputed funds into the court for ultimate distribution. *See Chapter II E. 12. Supra., Third Party's Interest in a Client's Recovery*.

A lawyer who fails to adequately safeguard a client's property may be subject to civil liability, and/or disciplinary sanctions. When a lawyer is guilty of converting a client's funds, many

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jurisdictions will not consider mitigating factors (e.g., restitution, alcoholism, or psychological problems) and will automatically mandate disbarment. *In re Wilson*, 81 N.J. 451, 455 (1979) (“Recognition of the nature and gravity of the offense suggests only one result – disbarment”); *In re Miller*, 86 A.D.2d 344, 345 (1st Dep’t 1982) (“[T]his court has consistently held that disbarment is the appropriate penalty for conversion”); cf. *Columbus Bar Ass’n v. Thompson*, 69 Ohio St. 2d 667 (1982); *Matter of Einhorn*, 88 A.D.2d 95 (2d Dep’t 1982).

EXAMPLE:

After a client recovered a \$100,000 settlement on his claim, the client’s former wife delivered to the client’s attorney a court order requiring that the client pay \$1,000 per month child support. The client is currently 14 months in arrears and the client’s former spouse wants the attorney to pay that \$14,000 amount out of the settlement funds.

Here, the attorney does not have to pay her since there is no statutory or contract lien. The court order does not relate to the funds held in escrow. It simply orders the client to pay a certain amount. Only if the former spouse obtained a court order attaching part of the escrow funds would the attorney be required to withhold that amount from client.

C. CLIENT ACCESS TO A FORMER LAWYER’S FILES

When a client discontinues an attorney-client relationship, what right does the client have to obtain the attorney’s files kept in the course of representing the client? In line with the national majority view, the New York Court of Appeals held that former counsel must disclose the entire file to newly-retained counsel, as the “obligation of forthrightness of an attorney toward a client is not furthered by the attorney’s ability to cull from the client’s file documents . . . which the attorney unilaterally decides the client has no right to see.” *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 37 (1997) (internal citations omitted). Thus, the Court adopted the majority view, “[a]ffording the client presumptive access to the attorney’s entire file on the represented matter,” subject to narrow exceptions. *Id.* at 34, 37. The Court also held, however, that former counsel could withhold work product containing the lawyer’s thoughts concerning the client or issues in the case. In its holding, the Court of Appeals expressly rejected the minority view, which requires disclosure only of documents representing the “end product,” of an attorney’s services (i.e., documents exposed to public light, such as pleadings; client correspondence; and final versions of documents, such as wills) and does not require disclosure of the attorney’s “work product” (i.e., documents leading to the creation of end product documents, such as internal legal memoranda and drafts). *Id.* at 34-35.

The minority view in this country is that a lawyer only has to turn over the “end product,” but need not deliver the attorney’s “internal notes and memos.” The ABA has stated this approach is the minimum required. *ABA Formal Op. 1376* (1977). “However, there may be circumstances . . . that require the lawyer to provide additional material related to the representation. For example, when the representation is terminated before the matter is concluded, then protection of the client’s interest may require the lawyer to provide the client the papers or property generated by the lawyer for the lawyer’s own purpose. *ABA Formal Op. 471* (2015).

Upon termination of representation, a lawyer has a duty to surrender, promptly, all papers and other property to which the client is entitled. *Rule 1.16(d)*. This includes documents in tangible or electronic form. *ABA Formal Op. 471*, at 5 n.28 (2015). If a lawyer wishes to keep a copy of a

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client's file, the lawyer must assume the cost of copying documents generated in the matter, unless the expense was otherwise provided for in the retainer letter. *ABA Formal Op. 471 n.35 (2015)*, e.g., court documents, discovery depositions, etc. *Rule 1.16 annot. (2016)* (under the heading "*Subsection (d): Duty upon Termination of Representation*," subheading "*Costs of Surrendering File*"). See Chapter II. E. 7 and 8 of this book on charging liens of a discharged lawyer.

CHAPTER IX

RESTRICTIONS ON LAWYERS' COMMUNICATIONS

A. LAWYERS' PUBLIC COMMUNICATION ABOUT SERVICES

1. Advertising

"A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." *Rule 7.1*. Whatever medium the lawyer uses to advertise her services (e.g., billboards, newspaper advertisements, web pages, etc.), the statements therein must be truthful and non-misleading. *Rule 7.1 cmt. 1*. Disciplinary sanctions may be imposed even if the lawyer's misrepresentation was not made intentionally or knowingly. *Rule 8.4(c)*.

Prior to 1977, individual states placed an absolute prohibition on advertising by lawyers. In 1976, the United States Supreme Court first discussed First Amendment considerations pertaining to advertising by professionals. In *Virginia Board of Pharmacists v. Virginia Citizens' Consumer Council*, 425 U.S. 748 (1976), the Court considered whether pharmacists should be allowed to advertise the prices of certain standard drugs, notwithstanding a state-imposed ban on such advertising. The Court held that the First Amendment protects that kind of truthful, non-misleading commercial speech.

The Supreme Court extended the commercial speech doctrine to advertising by lawyers in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), by holding that states could not prevent lawyers from advertising prices for "routine legal services."

In *Bates*, the Supreme Court held that advertising by lawyers is a form of commercial speech protected by the First Amendment. "Advertising by attorneys may not be subjected to blanket suppression." *Id.* at 383. In so holding, the Court rejected several justifications for Arizona's ban on lawyer advertising (e.g., advertising's potential adverse effect on professionalism, advertising would stir up litigation, increase the cost and quality of legal services, and be too difficult to regulate). The Court in *Bates* found that the potentially adverse effect of the advertising was not sufficiently related to a substantial state interest to justify so great an interference with a lawyer's First Amendment rights. The Court rejected the state's justifications, labeling them "severely strained," "unpersuasive," "without merit," and "dubious."

Since *Bates*, many courts, including the United States Supreme Court, have attempted to define the limits of a lawyer's First Amendment rights with respect to commercial speech. While the Supreme Court held in *Bates* that states could not impose a total ban on advertising by lawyers, it specifically stated that such advertising *could* be regulated. The Court in *Bates* noted that advertising by lawyers poses special risks. Because "the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising might be found quite inappropriate in legal advertising" (footnote omitted). *Id.*

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QUERY:

A law firm placed an advertisement in the Yellow Pages to inform the public of a new office. The advertisement listed 18 areas of practice and the states in which the partners were admitted to practice, and stated that the partners were admitted to practice before the United States Supreme Court. Is the firm subject to discipline?

HELD:

No. In *Matter of R.M.J.*, 455 U.S. 191 (1982), the United States Supreme Court held that a state has no substantial interest in prohibiting identification of the jurisdictions in which a lawyer is licensed to practice. Mention of the areas of a lawyer's practice is clearly permissible because it does not in any way mislead the public. Finally, the Court addressed the troubling issue of the law firm's boldfaced proclamation that the attorneys were members of the Bar of the United States Supreme Court. "The emphasis of this relatively uninformative fact is at least bad taste," but there was no finding that anyone was misled by the statement. *Id.*

DR 2-101(B) of the old A.B.A. Model Code of Professional Responsibility provided a list, still relevant today, on what a lawyer's advertisements or broadcasts may contain:

1. Name, address, and telephone number of each lawyer;
2. Fields of law in which the firm practices;
3. Date and place of birth of each lawyer;
4. State and federal bar admissions for each lawyer and dates for same;
5. Schools attended and degrees earned by each lawyer. An attorney also may advertise that the attorney has received an LL.M. *A.B.A. Informal Op. 1131 (1970)*;
6. Public or quasi-public offices;
7. Military service;
8. Legal articles authored;
9. Legal teaching positions held;
10. Memberships in bar associations as well as committees and offices held;
11. Memberships in legal fraternities or legal societies;
12. Technical and professional licenses;
13. Memberships in technical and professional societies;
14. Foreign language abilities;

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15. Bank references;
16. Names of clients regularly represented (with each client's written permission);
17. Whether the firm participates in prepaid legal plans;
18. Whether the firm accepts credit cards;
19. Office and telephone answering hours;
20. The fee for initial consultations;
21. The availability of written fee schedules;
22. Contingent fee rates;
23. The range of fees for services;
24. The lawyers' hourly rates; and
25. The firm's fixed fees.

To avoid a First Amendment challenge that such a detailed regulation is “content based,” the Rules do not specify the 25 categories above, but all are implicitly included in Rule 7.1. The contents of DR 2-101(B) are listed here as illustrative because the MPRE Examination frequently uses fact patterns drawing from these listed permissible areas of advertising.

The Second Circuit Court of Appeals held that New York could not prohibit advertisements using descriptive words such as “Heavy Hitters” and could not prohibit pop-up ads on a website. *Alexander v. Cahill*, 634 F. Supp. 2d 239 (N.D.N.Y. 2007), *aff'd in part, rev'd in part*, 598 F.3d 79 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 820 (2010).

Rule 7.4 allows a lawyer to truthfully communicate that he or she does or does not practice in a particular field or that the lawyer limits his or her practice to a certain field. *See Peel v. Attorney Disciplinary Comm.*, 496 U.S. 91 (1990); *Matter of R.M.J.*, 455 U.S. 191 (1982) (*permitting an attorney to truthfully assert that he or she is a “specialist”*).

Lawyers may truthfully advertise through written, recorded, or electronic communications, including public media. The Rules continue to permit the use of radio, television, newspapers, and telephone books as advertising media. *Rule 7.2(a)*. Your authors have seen or read about lawyer advertising on billboards, taxi cabs, matchbook covers, pencils, key chains, and sporting event programs. Can sky writing be far behind?

Any advertisement shall include the name of at least one lawyer responsible for its content, and a copy of it shall be kept for two years together with the specifics of how, when, and where the advertisement was published or displayed. *Rule 7.2*.

New York's requirement that a lawyer's name and address be disclosed in all advertisements was held not to infringe upon lawyers' First Amendment rights to freedom of commercial speech.

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Citing 22 N.Y.C.R.R. § 691.22 and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-51 (1985), the Appellate Division, Second Department, stated,

[a]ppellant . . . overlooks material differences between disclosure requirements and outright prohibitions on speech. In requiring attorneys who advertise their willingness to represent clients . . . [to make certain disclosures, the statute] has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.

Anonymous v. Grievance Committee, 136 A.D.2d 344, 348 (2d Dep't 1988).

EXAMPLE:

A law firm mailed brochures to 1,000 real estate brokers that quoted the firm's legal fees for various real estate transactions and solicited employment in connection with real estate closings. Is this form of solicitation constitutionally protected by the First Amendment?

HELD:

No. There is "a substantial governmental interest in preventing conflicts of interest in attorney-client relationships . . ." Such restriction does not amount to a general ban upon all mailings by attorneys, but rather imposes a reasonable limitation on lawyers' solicitation of real estate brokers to refer clients to those lawyers. The conflict arises because a lawyer, beholden to a broker for referrals of real estate business, may not diligently negotiate on behalf of his client the lowest level commission to be paid to the broker; also, a lawyer's determination of whether title is marketable may be colored by the fact that the referring broker will receive no commission unless title closes. *Matter of Alessi*, 60 N.Y.2d 229, 233 (1983); see also *Matter of Greene*, 78 A.D.2d 131 (2d Dep't 1980), *aff'd*, 54 N.Y.2d 118 (1981), *cert. denied*, 455 U.S. 1035 (1982).

A lawyer's advertisement may contain client testimonials. *N.Y. State 614* (1990). An attorney is permitted to advertise the names of clients regularly represented, provided the clients give prior written consent. Recognizing that client testimonials go even further than endorsements and have the potential to mislead, the Committee declined to adopt a per se prohibition of testimonials, but prohibited testimonials that:

1. fail to provide sufficient information to allow potential clients to make an informed decision on whether to seek the lawyer's services;
2. create unjustified expectations or false hopes (*Matter of R.M.J.*, 455 U.S. 191, 200 n.11 (1982)); or
3. offer overblown assurance of a client's satisfaction. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475 (1988).

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The Supreme Court has held that false or deceptive advertising may be prohibited entirely. On the other hand, states “may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information may be presented in a way that is not deceptive.” *Matter of R.M.J.*, 455 U.S. at 203. A lawyer “may publish or broadcast” certain information to the public so long as it does not contain a false, fraudulent, misleading, deceptive, or unfair statement or claim. *Rule 7.1*.

Advertising that contains a “false or misleading” communication is:

1. Advertising that contains a material misrepresentation of law or fact or omits a fact necessary to prevent misleading a reader. *Rule 7.1*. For example, the following may be misleading: advertising a fixed fee for services but failing to disclose hidden filing fees or court costs, or advertising a fixed fee but not adhering to it either because the matter is complex or because the matter requires substantial amounts of an attorney’s time. Also, advertising “NO RECOVERY, NO LEGAL FEE” is misleading because it fails to disclose the litigation costs a client may be required to pay in a losing suit. On the other hand, client testimonials are not inherently misleading where they are accompanied by a disclaimer stating that past results are not indicative of future performance. *Alexander v. Cahill*, 598 F.3d 79, 92 (2d Cir. 2010) (*New York requires such a disclaimer*); see also *N.Y.S.B.A. Ethics Op.* 834 (2009).
2. Advertising that is likely to create an unjustified expectation about the results the lawyer can achieve. *Rule 7.1 cmt. 3*. For example, the following may create unjustified expectations: advertising the result achieved for another client or the percentage of successful trials that have been conducted by the lawyer. Such information may create the expectation that similar results can be obtained for others without regard to the specific factual and legal circumstances of the potential client’s particular case. To prevent creating unjustified expectations, the ad should contain a conspicuous disclaimer: “Not all cases result in such successful results.”
3. Advertising that compares the advertiser’s services with other lawyers’ services can be prohibited unless such claims are susceptible to measurement or verification. *Rule 7.1 cmt. 3*. For example, the following statements are suspect: “I’m as good as the Wall Street firms” or “I’m the best trial lawyer in New York.” If a lawyer cannot objectively verify a statement, it should not be put into an advertisement even if it is expressed as an opinion. Comparisons as to the “quality” of legal services generally are misleading because they are not susceptible to measurement or verification.

EXAMPLE:

An attorney’s advertisement contained a drawing of a Dalkon Shield followed by words to the effect that (a) women who have been injured by the shield have legal remedies, and (b) the advertiser has experience in representing such persons on a contingent fee basis, which results in no legal fee if there is no recovery. The United States Supreme Court found the phrase “[i]f there is no recovery, no legal fees are owed” to be misleading if the client remained responsible for litigation costs. The Court noted that the public is not likely to know the difference between legal fees and other litigation costs. However, the rest of the advertisement was constitutionally protected because the Court found that it was not inherently misleading, and the state

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could not articulate a substantial governmental interest in prohibiting such advertising. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

The Rules prohibit in-person, live telephone, or “real-time electronic Internet chat room contact” solicitation of legal employment for pecuniary gain, because this conduct could overwhelm the prospective client’s judgment. *Rule 7.3(a)*. The Rules, however, do not prohibit such direct solicitations of another lawyer, including in-house counsel, family members, close personal friends, and prior clients. *Id.*

Even otherwise permissible face-to-face, live phone or mail solicitations are prohibited if the prospective client has made known to the lawyer a desire not to be solicited by the lawyer. Here, the lawyer should immediately cease further solicitation. *Rule 7.3(b)(1)*.

Targeted mailings and pre-recorded telephone messages are permitted, provided they do not involve “coercion, duress or harassment.” *Rule 7.3(b)(2)*.

Every written or pre-recorded advertising communication soliciting employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall conspicuously contain the words “Advertising Material” on the outside of the envelope and at the beginning and ending of any pre-recorded communication. *Rule 7.3(c)*.

Today, attorneys may advertise through “electronic communication” including e-mail and the Internet. Electronic communication can be an important source of information about legal services. However, using an active chat room and the Internet to solicit prospective clients through a “real-time electronic” exchange, not initiated by the prospective client, is a prohibited form of advertising.

Comparing direct written mail, pre-recorded telephone, or passive e-mail solicitation by lawyers with in-person solicitation for profit, the United States Supreme Court noted that “the mode of communication makes all the difference.” *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 475 (1988). A letter, like a written advertisement, can readily be put in a drawer to be considered later, ignored, or discarded.

The Supreme Court has upheld the right of states to prohibit mail solicitations when the lawyer knows or should know that the recipient’s mental or emotional state prevents the exercise of reasonable judgment regarding the employment of legal counsel. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *In re Anis*, 599 A.D.2d 1265 (N.J. Sup. Ct. 1992). For example, under this rule, a lawyer would be prohibited from sending a solicitation letter to a father the day after the father learned that his son had died on the Pan American flight that exploded over Lockerbie, Scotland. In 2007, New York adopted a 30-day moratorium on direct mail solicitation of personal injury or wrongful death claimants. *Rule 7.4(e)*. This has been upheld by a federal court. *Alexander v. Cahill*, 634 F. Supp. 2d 239 (N.D.N.Y. 2007), *aff’d in part, rev’d in part*, 598 F.3d 79 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 820 (2010).

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2. Face-to-Face Solicitation of Business

“A lawyer shall not by in-person, live telephone or real-time electronic contact, solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted (1) is a lawyer or (2) has a family, close personal, or prior professional relationship with the lawyer.” *Rule 7.3(a)*. “Solicitation” is defined as “a targeted communication initiated by the lawyer that is directed to a specific person, and that offers to provide, or can reasonably be understood as offering to provide legal services. Rule 7.3 at cmt. [1]. The comment continues: “a layer’s communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website, or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.”

EXAMPLE:

Attorney Alpha decided to leave his firm and either go to another law firm or open his own practice. Prior to advising his law firm about his imminent departure, can he approach firm clients to solicit their business in her new firm?

Solicitation is a communication “directed to a specific person.” *Rule 7.3 cmt. [1]*. A communication is not a solicitation if it is directed to the general public, responsive to a request for information, or is automatically generated in response to Internet searches. *Id.*

We have already noted above the basic prohibition against in person face-to-face or live telephone solicitation of clients except where the client solicited:

1. is an attorney;
2. has a family relationship with the attorney;
3. has a close relationship with the attorney; or
4. has a prior professional relationship with the attorney. *Rule 7.3(a)(1) and (2)*.

Thus, the lawyer can make face-to-face solicitation of those clients with whom she has worked actively and substantially *before* she leaves the firm. *Restatement of Lawyering § 9(3)*. A.B.A. Formal Opinions 1457 (1980) and 99-414 (1999) recommend mailing an announcement to all firm clients after the attorney has left the firm. The A.B.A. also advises that such notice should “not disparage the former firm.”

A lawyer leaving a law firm “does not have a prior professional relationship with a client sufficient to permit in-person or live telephone solicitation solely by having worked on a matter for the client along with other lawyers in a way that afforded little or no direct contact with the client.” *A.B.A. Formal Op. 99-414 (1999)*. She may contact the former firm’s clients by mail *after* she has left the firm. *Id.*; *Ronald D. Rotunda, Legal Ethics § 7.3-4 at 1275 (2015-2016)*.

The general prohibition against solicitation extends to indirect solicitation through the use of agents. *See Rule 8.4(a) (prohibiting a lawyer from violating or attempting to violate the Rules of*

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Professional Conduct through the acts of another); Rule 7.3 annot. (2015) (under the heading “Solicitation by Third Persons”).

In *Ohralik v. Ohio State Bar Association*, the United States Supreme Court addressed the First Amendment concern of lawyers who solicit business through in-person communication with prospective clients. 436 U.S. 447 (1978). The *Ohralik* case involved an attorney who met with two accident victims, one at the hospital while she was in traction and the other at her home on the day she was released from the hospital. The attorney had not been invited by either victim. At these meetings, the victims orally agreed to let the attorney represent them, but they later decided against filing suit. The Court held that a per se rule against such in-person solicitation was not unconstitutional because of the inherently injurious nature of such communication. The Court found that this type of solicitation, unlike a public advertisement -- which simply provides information and leaves the recipient free to act upon it or not -- may exert pressure and often demands an immediate response without providing an opportunity for comparison or reflection. “[T]he potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.” *Id.* at 465.

Keep in mind that the Rules do not prohibit face-to-face solicitation when no pecuniary gain is to be earned. Prohibited solicitation occurs only when the lawyer is recommending employment of himself or herself as a private practitioner. When the attorney does not stand to benefit financially from an in-person solicitation, there is no ethical restriction. Nor do the rules generally prohibit lawyers from giving unsolicited advice, even when such advice is given in person, unless the lawyer (or the lawyer’s firm) accepts employment resulting from the advice. *A.B.A. Informal Op. 1469* (1981).

QUERY:

Alpha, an attorney with the American Civil Liberties Union, met with a group of women who were sterilized as a condition of receiving public medical assistance, to discuss their legal rights. Thereafter, the ACLU informed Alpha that it was willing to provide representation for those who had been sterilized. Alpha sent follow-up letters to some of the women offering to represent them free of charge. A complaint was filed with the local grievance committee, charging that Alpha engaged in unethical solicitation. Is Alpha subject to discipline?

HELD:

No. There was no unethical solicitation here. Alpha’s actions were undertaken to express her personal political beliefs and to advance the civil liberty objectives of the ACLU, rather than to derive financial gain for Alpha. This form of political expression is protected by the First Amendment. *In re Primus*, 436 U.S. 412 (1978).

QUERY:

Beta, a lawyer employed by the Legal Services Corp., a not-for-profit organization that provides free legal services to indigents, approached a juvenile inmate in a local county jail. Beta told the juvenile that he could maintain a suit against the county for monetary damages because the jail was overcrowded.

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As a result of this unsolicited advice, the juvenile retained Beta and the Legal Services Corp. to institute an action. Beta stood to receive no pecuniary benefit from the suit other than his salary from the Legal Services Corp. A complaint was filed with the grievance committee, alleging that Beta's solicitation of the juvenile was improper. Is Beta subject to discipline?

HELD:

No. The Disciplinary Rules permit a lawyer to accept employment after giving unsolicited advice if the attorney cooperates with an agency that provides free legal services. Where no fee is charged, solicitation is not motivated by pecuniary gain. *Kentucky Bar Ass'n v. Wilkey*, 609 S.W.2d 370 (Ky. 1980).

3. Lawyers' Websites

Today, a very frequent means of lawyers' communications with the public is on the lawyer's website. Clearly, a website is "advertising." Thus, it must be truthful and not misleading, and it cannot lead a potential client to unjustified expectations about the results the lawyers can obtain in the client's case.

Some websites have a link permitting the potential client to chat with the lawyer. *A.B.A. Formal Op. 10-457 (2010)* (citing, in a footnote, an Arizona ethics opinion which advises that lawyers should not answer specific legal questions in internet chat rooms, unless a particular question presented is "of a general nature" and the advice given is "not fact-specific").

The lawyer's website should contain a conspicuous warning that none of the statements on the website should be considered legal advice, and that any e-mail disclosures initially sent to the lawyer are not confidential. *Id.* It should also warn that no professional relationship arises from a visit to the website.

4. Lawyers' Communication with the News Media

The United States Supreme Court has stated that prejudicial trial publicity is:

extrajudicial [outside the court room] statements by any lawyer [involved in the case] . . . which divulge prejudicial matters, such as the [defendant's] refusal . . . to submit to interrogation or take any [potentially incriminating] tests; any statement made [by defendant] to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.

Sheppard v. Maxwell, 384 U.S. 333, 361 (1966).

Rule 3.6(a) prohibits a lawyer (or a lawyer associated with a firm or government agency) who is participating in the investigation or litigation of a matter from making an out-of-court statement that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. In a divided opinion, the United States Supreme Court addressed and upheld Rule 3.6(a). *Gentile v. Nevada State Bar*, 111 S. Ct. 2720 (1991). A majority of the Court concluded that the standard of "substantial likelihood of materially prejudicing" a fair trial passed

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First Amendment scrutiny. It was unnecessary, said the Supreme Court, to impose the more demanding standard of “clear and present danger” of actual prejudice. The Rules restrict the extrajudicial speech of a participating lawyer (but not a witness, victim, accused, police officer, or other lawyer who is outside the case and engaged as a broadcast commentator) on matters of character, reputation, or prior criminal record (including prior arrests, possibility of a guilty plea, results of any examinations or tests, credibility of any witnesses, and, clearly, an attorney’s personal opinion on the guilt or innocence of the accused or the merits of the case). However, a lawyer is permitted to publicly identify the accused, the circumstances of the arrest, and the time of seizure. The attorney may also note that the accused denies the charges. *Rule 3.6(b)*.

Under Rule 3.6(a), a lawyer (most frequently a prosecutor) may not make an extrajudicial statement with regard to evidence expected to be presented at a trial, because the opposing party may seek to suppress that evidence. Public disclosure of such evidence may prejudicially circumvent a subsequent suppression order and prejudice the defendant’s right to a fair trial.

Whether a lawyer’s speech violates Rule 3.6 depends on such factors as the nature of the statement, the timing of the statement (e.g., disclosing prejudicial evidence to the press during or just prior to the start of the trial is highly disfavored), whether the trial is civil or criminal, and whether it is a bench trial or a trial by jury (extrajudicial statements by lawyers pose a greater threat to the administration of justice in a jury trial).

Under Rule 3.8(f), prosecutors shall refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused, except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose (e.g., statements allowed under Rule 3.6). Prosecutors must also exercise reasonable care and oversight to prevent anyone assisting or associated with the prosecutor from making prohibited statements. *Rule 3.8(f)*.

Rule 3.6 provides restrictions as to an attorney’s public “extrajudicial” statements with regard to a criminal case. Rule 3.6(b), however, outlines areas of permissible extrajudicial speech as follows:

1. Recitation of the claim, offense, or defense involved and, except where prohibited by law, the identity of the participants;
2. Information contained in a public record such as an indictment, arraignment, or complaint; since it is the prosecutor that drafts the indictment on the felony complaint, this unfairly allows highly prejudicial material to be inserted therein, which can then be distributed to the press and the public;
3. Revelation of the fact that an investigation of a matter is in progress;
4. The scope of the investigation, including the offense committed, the identity of the victim, the officers involved, and the length of the investigation;
5. A request to the public for assistance in apprehending the accused;
6. A warning to the public of any threatened dangers; and

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7. In a criminal case, the identity, residence, occupation, and family status of the accused.

Rule 3.6(c) allows lawyers involved in the case to make public statements not otherwise allowed in order to rebut prior public statements not initiated by the client or her lawyer, made, for example, by police investigators or prosecutors. In other words, an improper public statement by one side “opens the door” to the other side to make a rebuttal public statement. Rule 3.6(c) limits the rebuttal to information necessary to mitigate the recent adverse publicity.

To be distinguished from a public statement by a lawyer involved in a court case is a lawyer’s out-of-court derogatory statement about the qualifications or integrity of a judge or an elected or appointed candidate for judicial office. *Rule 8.2(a)*. A lawyer is prohibited from making statements that the lawyer knows to be false or making statements with reckless disregard as to their truth. “Expressing honest and candid opinions on such matters contributes to improving the administration of justice.” *Rule 8.2 cmt. 2*.

B. FIRM NAMES AND LETTERHEADS

A law firm may use a trade name (e.g., ABC Legal Clinic) as long as the name does not imply a connection with a government agency or a charitable legal organization, and as long as it is not otherwise false or misleading. A firm may also be designated by a distinctive website address (e.g., www.lawyers.com).

EXAMPLE:

The name “Queens County Legal Clinic” should contain a disclaimer that it is not a public legal aid clinic, to avoid misleading the public. *Rule 7.5 cmt. 1*.

If a law firm practices law in more than one jurisdiction, the same name can be used in both jurisdictions, provided the firm’s letterhead indicates each lawyer’s individual jurisdictional limitation.

Lawyers who simply share rent and office overhead cannot designate themselves as partners or assert a title on the letterhead or door of a law firm, as this would be a misleading statement suggesting that the lawyers are practicing law together in a firm. *Rule 7.5(d)*.

C. REFERRALS

Rule 7.2(b) states that a lawyer shall not give anything of value to a person for recommending the lawyer’s services, except a lawyer may:

1. pay the reasonable costs of legal advertising and public relations;
2. pay the usual charges of a:
 - a. qualified lawyer referral service (consumer-oriented and providing unbiased referrals) that has been approved by an appropriate regulatory authority;

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- b. not-for-profit lawyer referral service that has been approved by an appropriate regulatory authority; or
 - c. legal service organization, which may be a for-profit entity, providing a prepaid legal service plan;
- 3. pay to purchase another lawyer's law practice (in such a situation, Rule 1.17 is also implicated);
 - 4. enter a nonexclusive reciprocal referral arrangement with another lawyer or a non-lawyer professional (e.g., accountant, psychiatrist, engineer, etc.) to recommend and refer their clients to the other professionals, provided the client is informed of the existence and nature of the agreement.

EXAMPLE:

Attorney Alpha may agree with Bob, a real estate broker, to refer her legal clients to Bob in return for Bob referring his real estate clients to Alpha. The agreement cannot be exclusive (i.e., Alpha must remain free to refer clients to other brokers).

EXAMPLE:

Attorney Alpha, a real estate lawyer, may refer clients in need of a criminal lawyer to Attorney Bravo, a criminal lawyer, in return for Attorney Bravo referring her clients in need of a real estate lawyer to Attorney Alpha.

EXAMPLE:

New Jersey has given the green light to websites that charge lawyers a monthly fee to be the exclusive attorney in a given zip code area for a specific area of practice (e.g., Bankruptcy, D.W.I.), plus a pay-per-lead fee for each client put in contact with the lawyer through this system. *N.J. Sup. Ct., Comm. on Att'y Advertising, Op. 43 (2011)*. To determine whether such marketing arrangements are acceptable advertising or an impermissible lawyer referral service depends on the accuracy and sufficiency of the website's information given to the consumer.

D. GROUP LEGAL SERVICES

A lawyer is permitted to approach a leader of an organization (e.g., the head of a labor or municipal union, but not the individual members) to inquire whether the group may have interest in prepaid legal plans for its members.

Rule 7.3(d) authorizes direct personal contact by the legal plan (but not the lawyer) to enroll paying members in the prepaid, non-lawyer controlled group legal service plan, provided 1) the plan is not owned or directed by the lawyer, and 2) the plan or group legal service does not direct its solicitation to a person known to be in need of legal services in a particular matter (e.g., an accident victim). Thus, plan sponsors, with whom the lawyer has no prior professional relationship and who sell prepaid legal insurance plans (usually insurance companies), are free to aggressively market

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and solicit subscribers to the plan, even though such conduct by lawyers is severely curtailed by the Rules of Professional Conduct.

Legal services can also be provided by nonprofit organizations (e.g., NAACP, The Sierra Club) to advise members of their legal rights and provide counsel to protect those rights.

E. LAWYERS' COMMUNICATIONS WITH ADVERSE PARTIES

1. Communicating with a Person Represented by Counsel

When a lawyer engaged in a matter actually “knows” that a person is represented by an attorney, the lawyer shall not communicate with that person (another party or even non-party fact witness represented by counsel) concerning the subject matter of the representation, regardless of who institutes the contact. *Rule 4.2*. The lawyer must instead communicate with the attorney who represents that person. This “no contact” Rule applies to counsel for one defendant talking to the co-defendant or to a plaintiff, and it also applies to prosecutors talking to criminal suspects “known” to be represented by counsel even at the pre-indictment stage (including noncustodial interrogation by prosecutors).

Lawyers often receive calls from other parties involved in a particular litigation who are represented by an attorney. It is unethical for the lawyer receiving the call to discuss the subject of the representation with the party known to be represented by counsel, even if the caller insists, unless the lawyer first receives consent from the calling party’s lawyer. The thrust of this rule is to protect a represented party from being taken advantage of by another lawyer in the case; the rule protects lay persons from making improvident and ill-advised settlements, disclosures, or concessions.

This rule does not prohibit an attorney who is not representing anyone in a matter from communicating with a party who is represented by a lawyer in a matter where the client seeks a second legal opinion on the matter. *Rule 4.2 cmt. 4*.

The Rule 4.2 restriction applies only when a lawyer has *actual knowledge* that the person is represented by a lawyer. Knowledge, however, may be inferred from the circumstances, and, thus, the lawyer may not circumvent the Rule by closing his or her eyes to the obvious. *Rule 4.2 cmt. 8; ABA Formal Op 422, n.17 (2016)*.

“[F]or example: when a lawyer representing a client faces what appears to be a *pro se* opposing party who has filed a pleading that appears to have been prepared by a lawyer or where a lawyer representing a client in a transaction is negotiating an agreement with what appears to be a *pro se* person who presents an agreement or counter offer that appears to have been prepared by a lawyer.” *Id.*

If a *pro se* party has received prior limited “unbundled” legal representation then:

1. If the limited legal representation has been completed and the lawyer providing the limited scope representation is not expected to reemerge, then another lawyer may communicate directly with the *pro se* party.
2. “If the [opposing *pro se* person] declares that the representation is under a limited-scope

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agreement and does not articulate either that the representation has concluded (as would be the case if the person indicates that yes, a lawyer drafted documents, but is not providing any [further] representation) or that the issue to be discussed is clearly outside the scope of the limited-scope representation, then the lawyer should contact opposing (limited-scope) attorney to determine the issues on which the inquiring lawyer may not communicate directly with the client receiving the limited-scope representation. *Id.*

Communications between a lawyer and someone not represented by counsel in the matter are governed by Rule 4.3 (dealing with an unrepresented person). *See infra, this Chapter at E. 2.*

EXAMPLE:

Where two co-defendants in either a criminal or civil case are represented by separate counsel, the attorney for one co-defendant may not directly contact the other co-defendant to gather information or for any other reason related to the matter without first obtaining the consent of the represented co-defendant's attorney.

EXAMPLE:

Alpha represents Client who is being sued by Plaintiff for serious disabling injuries that Plaintiff allegedly suffered when she fell on Client's property. While the suit was pending, Alpha received a telephone tip that Plaintiff had suffered no injuries, and that, in fact, she was secretly working as a masseuse in a health spa. Alpha sent his investigator to the health club to get a massage from Plaintiff and to engage Plaintiff in small talk.

Since Plaintiff is represented by counsel, neither the attorney nor the attorney's agent may engage Plaintiff in conversation about the subject matter of the law suit. Alpha would not be subject to discipline here, however, because Alpha merely sent an investigator to observe whether Plaintiff was physically impaired. Engaging in "small talk" is not communicating about the subject of the representation.

Prohibited communications between an attorney and an adverse party can be either oral or written (e.g., sending the adverse party a letter or copies of certain documents, offers of settlement, or drafts is prohibited). *A.B.A. Informal Op. 1373 (1976).*

EXAMPLE:

After making a very favorable settlement offer to plaintiff's counsel a few weeks before the trial, the defendant's lawyer suspected that plaintiff's counsel had not conveyed the offer to the plaintiff. If the defendant's lawyer met the plaintiff at a Chamber of Commerce business luncheon, could she inquire whether the plaintiff had been advised of the settlement offer? No, the attorney may not communicate with a represented party on matters concerning the representation.

EXAMPLE:

On the eve of a personal injury trial, the defendant's lawyer, Bravo, Googles the plaintiff's name and a Facebook page pops up. Bravo requests to "friend" plaintiff,

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and the plaintiff accepts and the plaintiff's private pages show he is not as debilitated as he has asserted in the lawsuit.

Is Bravo subject to discipline? The New York State Bar Ethics Committee says yes for the following reasons:

1. Since plaintiff is represented by counsel, Rule 4.2 prohibits Bravo from communicating with that represented party concerning the subject matter of the representation absent prior consent from plaintiff's attorney.
2. If plaintiff was not represented, Rule 4.3 prohibits a lawyer's communication indicating the lawyer is disinterested. The lawyer's request to "friend" the plaintiff also runs afoul of Rule 8.4(c) prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. *N.Y.S.B.A Ethics Op. 843 (2010)*. Likewise, the lawyer could not ask a spouse or paralegal to do the "friending" because of Rule 5.3(b)(1), which provides that lawyers cannot engage in unethical conduct indirectly if they are prohibited from doing it directly. *Id.* The Committee, however, held that the prohibition did not apply to mining public network pages of Facebook, Myspace, or other internet public websites for possible impeachment use in litigation.
3. The remedy for obtaining such private Facebook information is by pretrial discovery or court order. *Romano v. Steelcase, Inc.*, 30 Misc. 3d 426 (Sup. Ct. Suffolk County 2010); *U.S. v. Lifshitz*, 369 F.3d 173 (2d Cir. 2004); *McCann v. Harleysville Ins. Co. of New York*, 78 A.D.3d 1524 (4th Dep't 2010).

A lawyer may coach his or her own client to directly communicate with another party who is represented by a lawyer (via a letter edited by the attorney, a telephone conversation by the client, or even a face-to-face meeting). *Restatement of Lawyering § 99 cmt. k*. Thus, the defendant's lawyer may advise the defendant to directly communicate with the plaintiff regarding an outstanding settlement offer. *A.B.A. Formal Op. 92-362 (1992)*. In 2011, the A.B.A. expounded further on this opinion. It said the lawyer could suggest that the client have direct communications with an opposing party and that the lawyer could assist the client in developing the agenda or talking points for the communication, and could even draft a document that would be used by the client to communicate to the opposing party. *A.B.A. Formal Op. 11-461 (2011)*.

When the other party is a corporation or government organization, the prohibition against lawyer communication with another person known to be represented by counsel applies to any corporate employee who "supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter, or whose act or omission in the matter may be imputed to the organization for purposes of civil or criminal liability." The focus is on the employee's authority in the matter and the relationship with the organization's lawyer. *Rule 4.2 cmt. 7*.

Comment [5] to Rule 4.2 contains a broad statement about the "authorized by law" exception to the *ex parte* prohibition: "Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government." This does not include communicating with government employees whose conduct is in issue in litigation. *ABA Informal Op. 1377 (1977)*.

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An organization is not represented by a lawyer in every matter just because it has in-house counsel or an attorney on general retainer. The organization must have taken affirmative steps to retain counsel on the specific matter or referred it to in-house counsel before it is being represented by counsel. *ABA Formal Op. 95-396 (1995)*.

Consent of the organization's lawyer is not required for communication with a former employee (who quit, was fired, or has retired), since the former employee no longer could be construed as being a representative of the organization. *Rule 4.2 cmt. 7*.

Rule 4.2 does not prohibit an attorney involved in a civil lawsuit against the government from communicating directly with government officials who have authority to settle and make policy changes, provided advance notice of the communication is given in order to afford the official an opportunity to consult with government counsel. This preserves the First Amendment right to petition for redress of grievances. *A.B.A. Formal Op. 97-408 (1997)*.

EXAMPLE:

While preparing for trial in a zoning matter, plaintiff's counsel considers offering a different housing projects that might be acceptable to the government. Plaintiff's counsel may contact the government official who could approve and settle the litigation, but counsel must give government counsel advance notice of the intent to discuss such a settlement.

Note that this exception would not authorize plaintiff's counsel to conduct an *ex parte* interview of the government's planning department to get its input since the planning department does not have authority to settle or make the policy change.

A government lawyer, when communicating with an accused in a criminal matter, must not only honor the constitutional right of the accused, but must also comply with Rule 4.2. *Rule 4.2 cmt. 5*. Generally, a prosecutor's direct or indirect (by an undercover informant or government investigator) communication with a person represented, prior to the commencement of formal judicial proceedings (indictment or arraignment), does not violate Rule 4.2.

A prosecutor is "authorized by law to employ legitimate investigating techniques in conducting or supervising criminal investigations, and the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization." *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988). In *Hammad*, the prosecutor knew that the defendants were represented by an attorney on the matter under investigation but, nevertheless, had an informant approach them and record inculpatory statements. The Second Circuit concluded that prosecutors may legitimately employ the use of informants in conducting pre-indictment criminal investigations. In the event, however, of a prosecutor's misconduct, the court has the discretion to suppress the evidence since prosecutorial misconduct clearly is not "authorized by law" within the meaning of Rule 4.2.

Restatement of Lawyering section 99 lists the following exceptions to the rules prohibiting lawyers from communicating with persons known to be represented by an attorney:

1. When the lawyer is responding to an emergency. For example, Alpha, who represents Husband in an acrimonious divorce, receives a frantic call from Wife stating she is being physically abused by Husband and cannot reach her own lawyer. Alpha advises Wife to

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leave the marital home for the evening. This does not violate Rule 4.2 because the advice was rendered during an emergency. *Restatement of Lawyering* § 99(1)(d) *illus.* 5.

2. A represented client may seek a second opinion from another attorney who does not represent anyone in the matter. Here, there is no danger of overreaching, misrepresentation, or loss of confidentiality. *See Rule 4.2 cmt. 4.*
3. When authorized by law or court order. For example, when a lawyer serves process on a person represented by counsel or when a court orders a lawyer to contact orally or in writing another represented party. *Rule 4.2.*
4. A pro se lawyer is a party who represents himself or herself in a matter. Another attorney in the matter is free to communicate with the pro se lawyer even though that party is represented by counsel.

EXAMPLE:

Attorney Alpha receives a letter from Landlord's lawyer advising Alpha that his law office lease will not be renewed and that Alpha must quit the premises. Without the prior consent of the Landlord's lawyer, Alpha telephones Landlord to advise Landlord that the lease period has not expired and to agree that Alpha may remain on the premises. Alpha's conversation is permissible because Alpha is engaging in pro se representation as a party to the matter and Alpha represents no other party. *Restatement of Lawyering* § 99(1)(b).

New York's Professional Ethics Committee and a majority of states disagree, and apply the "no contact" rule to a lawyer who is a party to the action. *N.Y.S.B.A. Ethics Op. 879 (2011)*. "[L]awyers, by virtue of their professional status, have a unique responsibility to the system of justice that requires them to subordinate their personal interest in having direct communications with represented individuals" *Id.*

After a dispute has gone to final judgment, the plaintiff's lawyer may pursue the defendant directly either by letter, phone call, or personal contact to enforce the judgment.

2. Communication with Unrepresented Parties

Rule 4.3 states that "[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested." *Rule 4.3*. That is, the "lawyer may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents." *Restatement of Lawyering* § 103(1).

If the lawyer knows that the unrepresented non-client is confused or misunderstands the lawyer's role in the matter, then the lawyer must make reasonable efforts to correct the non-client's misunderstanding by, for example, identifying the lawyer's client and, if applicable, stating that the client has interests opposed to those of the unrepresented person.

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It is important to note that the Rules distinguish between two groups of unrepresented persons:

1. those whose interests may be adverse to those of the lawyer's client; and
2. those whose interests are not in conflict with the lawyer's interest.

Where the unrepresented person has interests that may be adverse to those of the lawyer's client, the lawyer is prohibited from giving any advice to that person other than to urge him or her to obtain counsel. *Rule 4.3 cmt. 2.*

EXAMPLE:

Defendant's lawyer, Beta, intends to tell an unrepresented plaintiff that he believes that plaintiff's personal injury claim is worth \$40,000. Before doing so, the lawyer should advise the plaintiff that, as the defendant's attorney, Beta is not disinterested. Even after so advising plaintiff, the lawyer should simply offer \$40,000 to settle and recommend that plaintiff obtain legal counsel.

Rule 4.3 "does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying obligation." *Rule 4.3 cmt. 2.*

A lawyer may interview a client's potential, *unrepresented*, adverse party and may take a statement if the lawyer advises the potential adverse party of the lawyer's role of undivided loyalty to the lawyer's own client. *A.B.A. Informal Op. 908 (1966)*. There is no impropriety where a lawyer does nothing more than obtain information from an individual not represented by counsel, even if the information may be detrimental to that individual. A common illustration of this arises when a lawyer prepares a settlement document and presents it for signature to an unrepresented adverse party. Is the mere act of presenting the document tantamount to giving advice that signing is appropriate? At least when the lawyer makes clear that he or she is representing only the interests of the client, the mere presentation of the document for signing should not constitute implicit advice. *Charles W. Wolfram, Modern Legal Ethics § 11.6 at 617 (1986)*.

In a transaction in which only one of the parties is represented, that [represented] person is entitled to the benefits of having a lawyer The lawyer may negotiate the terms of a transaction with the non-client and prepare transaction documents that require the signature of that party. The lawyer may advance the lawful interests of the lawyer's client but may not mislead the opposing party as to the lawyer's role.

Restatement of Lawyering § 103 cmt. d.

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F. COMMUNICATIONS ON SPECIALIZATION

1. Limitations of Practice

A lawyer may “communicate the fact that the lawyer does or does not practice in particular fields of law.” *Rule 7.4(a)*. “If a lawyer practices only in certain fields, or will not accept matters except in a specified field, the lawyer is permitted to so indicate.” *Rule 7.4 cmt. 1*.

2. Certification as a Specialist

The United States Supreme Court has stated that a lawyer may not be prohibited from truthfully advertising the fact that the lawyer had been certified as a specialist. *Peel v. Attorney Registration & Disciplinary Comm’n of Illinois*, 496 U.S. 91 (1990). The Court did say that the state could regulate (rather than prohibit) such statements to prevent misrepresentation by requiring the lawyer to disclose additional information about the certifying organization.

Under Rule 7.4 and *Peel*, a lawyer shall not state or imply that the lawyer is certified as a specialist in a particular field unless:

1. the lawyer has been certified as a specialist by an organization approved by an appropriate state authority or by the American Bar Association; and
2. the name of the certifying organization is clearly identified in the communication.

Traditionally, based upon long-established practice, lawyers who have passed the patent bar or who practice before the United States Patent and Trademark office may use the designation “Patent Attorney.” *Rule 7.4 (b)*. Likewise, lawyers engaged in admiralty practice may use the designation “Admiralty Attorney” or “Proctor in Admiralty.” *Rule 7.4(c)*.

G. COMMUNICATING WITH WITNESSES

The prohibition against contacting adverse parties does not apply to witnesses who may have relevant information. Accordingly, an attorney may interview any non-party witnesses in preparation for trial. *IBM v. Edelstein*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1994).

A lawyer shall not counsel a witness to hide or depart from the jurisdiction for the purpose of avoiding the call to testify at a deposition or trial. *Rule 3.4(a) and (f)*. Indeed, under Rule 3.4(f), a lawyer shall not request that a witness, other than a client, refrain from voluntarily giving relevant information to another party or attorney unless:

1. The witness is a relative, employee, or agent of the client; and
2. The attorney, in giving such advice to the witness, reasonably believes that the witness’s interests will not be adversely affected by refraining from giving such information -- e.g., that the witness will not be held in contempt. Note that Rule 8.4(b) or (d) also may be violated if the lawyer’s advice is illegal, or if it obstructs or prejudices the administration of justice, for example, by urging a non-party witness not to cooperate with a federal investigation.

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EXAMPLES:

It is improper for a prosecutor to advise witnesses that it would be better if they did not say anything to defense counsel. *State v. York*, 632 P.2d 1261 (Or. 1981). Also, it is improper for a prosecutor to advise a witness not to speak to defense counsel unless the prosecutor is present. *Gregory v. U.S.*, 369 F.2d 185 (D.C. Cir. 1966), *cert. denied*, 396 U.S. 865 (1969). “[W]e shall not tolerate the view that the government has some special right or privilege to control access to trial witnesses.” *U.S. v. Hyatt*, 565 F.2d 229, 239 (2d Cir. 1977).

It is permissible for a lawyer to tell a client, a member of the client’s family, or an employee not to talk with another lawyer about the incident involved. If, however, a lawyer advises a client or a client’s spouse or employee not to honor a subpoena or to be unavailable for depositions, such advice is not in the client’s best interest and also runs afoul of Rule 3.4(a), which concerns concealing or withholding evidence.

A lawyer may pay a witness’s expenses, including lost salary, reasonably incurred by a witness preparing for or attending a deposition or a trial. Lawyers must be careful not to overpay a witness (expert or lay) because Rule 3.4(b) also prohibits the lawyer from counseling a witness to testify falsely or offering to pay or paying an inducement to a witness. *See generally, supra, Chapter VI. C. 9. b.*

CHAPTER X

LAWYERS AND THE LEGAL SYSTEM

A. LAWYER ACTIVITY IN IMPROVING THE LAW

1. Pro Bono Service

Although pro bono services remain voluntary, every lawyer, regardless of workload or professional prominence, has a “professional responsibility” to donate legal services to those unable to pay. *Rule 6.1*. In part to offset recent cutbacks in state and federal funding to legal service organizations, Rule 6.1 asserts that lawyers “should” aspire to render at least 50 hours (individual jurisdictions can require more or less than this required number) of pro bono criminal or civil legal services per year. While this professional responsibility is “not intended to be enforced through disciplinary process,” all lawyers should nonetheless strive to make the 50-hour pro bono contribution set forth in Rule 6.1. *Rule 6.1 cmt. 12*. A “substantial majority” of the 50 hours should be provided to persons of “limited means,” or to certain organizations in matters that are designed primarily to address the needs of such persons. *Rule 6.1(a)*. Specifically, legal services given to “charitable, religious, civic, community, governmental or educational organizations in matters designed primarily to aid persons of limited means” may be credited toward the requirement. *Rule 6.1(a)(2)*. Additional services can be provided:

1. at “substantially reduced” rates to persons of “limited means,” pursuant to Rule 6.1(b)(2);
2. by participating in activities for improving the law, legal profession, or legal system (e.g., CLE teaching or bar association activities), pursuant to Rule 6.1(b)(3); or
3. for no fee or substantially reduced fees to groups or individuals to protect “civil rights, civil liberties or public rights” or to “charitable, religious, civic, community, governmental [or] educational organizations” to further their interests, if payment of the regular legal fees would significantly deplete their economic resources. *Rule 6.1(b)(1)*.

The pro bono service obligation is imposed even on government lawyers and judges, who are restricted from engaging in the outside practice of law. Their obligations can be satisfied by providing, for example, free legal training, mentoring, lobbying, or free advice to persons of limited means. Lawyers may also discharge the pro bono responsibility by providing financial support to organizations that provide free legal services to persons of limited means. *Rule 6.1 cmt. 9*.

Whether services are to be properly credited toward a lawyer’s pro bono requirement depends upon that lawyer’s original intent in performing those services. If the initial intent of the lawyer was to charge a fee, but thereafter the client did not pay, the lawyer’s services cannot be considered pro bono because a fee was anticipated when the case was accepted and the services performed. *Id. at*

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cmt. 4. Conversely, if pro bono services were originally intended, but the court awards a statutory fee, the resulting fee would not render the services non-pro bono. Lawyers are “encouraged” to contribute any such fee awarded for pro bono work to organizations that assist persons of limited means.

When it simply is not feasible for a lawyer to discharge the pro bono requirement by performing legal activities, it may be satisfied by:

1. providing money to an organization that renders free legal services. The amount paid should be “reasonably equivalent” to the value of the hours of legal service that would have otherwise been provided; or
2. the lawyer’s law firm satisfying the firm’s collective hours by designating a certain attorney or attorneys to satisfy the firm’s aggregate required pro bono hours. *Id. at cmt. 9.*

Although this is a viable option, law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by Rule 6.1. *Id. at cmt. 11.* Additionally, lawyers should also financially contribute to organizations that provide legal services to persons of limited means. *Rule 6.1(b)(3).*

2. Accepting Pro Bono Court Appointments

As noted earlier, there is no model rule that requires a lawyer to accept a client or a case. In fact, rarely does a week go by when your authors do not decline a case primarily because they feel that they cannot adequately represent the client’s matter due to other commitments. The general rule in this regard is that a lawyer may decline a client or case for a good reason, a bad reason, or no reason at all. The exception to this rule is when the court appoints a lawyer to represent a client who is otherwise unable to obtain counsel (usually for financial reasons). The Rules provide that a lawyer “shall not seek to avoid appointment” except for good cause (i.e., a compelling reason, such as a conflict of interest, or that the attorney is not qualified to handle the particular matter). *Rule 6.2.* Thus, a lawyer whose practice is limited to patent law or securities law may ask to be excused when appointed to represent a death row inmate in a habeas corpus petition - a matter that the lawyer is not competent to handle.

A lawyer shall not attempt to avoid being appointed by a court to represent persons of limited means, except when:

1. representing the client is likely to result in violating ethical rules or other law (e.g., the lawyer is not competent to undertake the matter, or by doing so, the proposed representation would create a prohibited conflict of interest – note that this conduct is also prohibited by Rule 1.16(a));
2. the representation would likely place an “unreasonable financial burden” on the lawyer; or
3. the case or client is so repugnant to the lawyer that it would impair the lawyer’s ability to represent the client. *Rule 6.2.*

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3. Membership in Legal Service Organizations

Lawyers are encouraged to serve as directors, officers, and members of legal service organizations that provide legal services to the poor (e.g., Legal Aid Society, public defenders, or pro bono programs). Service as a member, director, or officer of such an organization does not result in the lawyer having a lawyer-client relationship with every person served by that organization or with the organization itself and, accordingly, such a lawyer may represent clients who have interests that are adverse to those of the legal service organization's clients. *See Rule 6.3 cmt. 1*. In other words, simply sitting on the board or acting as an officer or member of one of the aforementioned organizations does not create a lawyer-client relationship with the organization's clients. However, a lawyer "shall not knowingly participate in a decision or action of [a legal service] organization" if doing so would be incompatible with the lawyer's obligation to the lawyer's existing clients, or could have a "material adverse effect" on the representation of a client of the organization whose interests are adverse to one of the lawyer's clients. *Rule 6.3*. Thus, in litigation involving clients who are represented by the legal service organization on one side with the lawyer's client on the other side, the lawyer must take extra care to avoid participating in decisions of the board that could be detrimental to the client served by the legal service organization and favorable to the lawyer's client.

4. Law Reform Activity

A lawyer serving as a member, officer, or director of a law reform organization (e.g., a bar association, the League of Women Voters, the NAACP, etc.) generally does not form an attorney-client relationship with that organization. *Rule 6.4 cmt. 1*. Thus, the law reform activity may affect (favorably or adversely) a client of the lawyer without violating an ethical rule. However, if a lawyer knows that a client will materially benefit by a law reform decision or recommendation in which the lawyer has participated, the lawyer "shall" disclose this fact to the organization but need not disclose the client's identity. *Rule 6.4*.

EXAMPLE:

Attorney Alpha, who served as the chairperson of the state bar association's tax committee, sought to draft proposed legislation for tax reform to be submitted to the state legislature. Alpha may draft this proposed reform even though, if passed, it would be detrimental to a client represented by Alpha. If the proposed law would benefit a client represented by Alpha, Alpha must disclose this fact to the bar association's president, but the client's identity need not be disclosed.

5. Client's Views vs. Attorney's Personal Views

Notwithstanding that an attorney is representing a client's position on a controversial public issue, no conflict of interest arises, and the lawyer's client's consent is not required, for the lawyer to openly take the opposite public position. *Restatement of Lawyering § 125*. "Loyalty to a client requires subordination of a lawyer's personal interests when acting in a professional capacity. But loyalty to a client does not require extinguishment of a lawyer's deepest convictions [when acting in a private capacity]" *Johnston v. Koppes*, 850 F.2d 594, 596 (9th Cir. 1988). *Rule 1.2(b)* unequivocally provides that an attorney's representation of a client, whether pro bono or fee-based, has no implications or restrictions upon an attorney's personal beliefs and activities. *Rule 1.2(b); see generally, supra, Chapter IV. A*.

B. IMPROPRIETY INCIDENT TO PUBLIC SERVICE

1. Public Official's Law Firm

The name of a lawyer who holds legislative, executive, or administrative public office (e.g., appointee to the United Nations, elected official, etc.) shall not be used in the law firm's name during any substantial period during which the lawyer is not regularly and actively practicing with the law firm. *Rule 7.5(c)*. This rule is to prevent a law firm from misleading clients into believing a lawyer could wield influence to the firm's advantage.

Likewise, a former judge who returns to private practice cannot continue to use, and should discourage others from using, the title "judge." The former judge may, however, inform potential clients of the judge's prior judicial experience. *A.B.A. Formal Opinion 95-391 (1995)*.

2. Negotiating Private Employment

A government lawyer shall not negotiate for private employment with anyone "who is involved as a party or as a lawyer for a party in a matter in which the government lawyer is participating personally and substantially. . . ." *Rule 1.11(d)(2)(ii)*; see generally, *supra*, Chapter IV.F.4.

A similar restriction is placed on mediators, arbitrators, judges and other third party neutrals. *Rule 1.12(b)*. However, law clerks to judges are permitted to negotiate employment with parties or lawyers involved in a matter in which the law clerk is personally and substantially involved but only after the judge is notified of this fact. *Rule 1.12(b)*; see generally, *supra*, Chapter IV.F.5.

3. Prior Participation

Unless all parties give informed consent confirmed in writing, a lawyer shall not represent anyone involved with a matter in which the lawyer participated substantially and personally as a judge, adjudicative officer, arbitrator or law clerk to such person. *Rule 1.12(a)*. "[T]he fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter when the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits." *Rule 1.12, Comment [1]*. In general, any participation on the merits and any participation in settlement discussions will be considered "personal and substantial." *Annotated Model Rules of Professional Conduct at 212 (5th ed. 2003)*; see generally, *supra*, Chapter IV. F.5.

Rule 1.11(a) likewise prohibits a government lawyer who leaves public practice from representing a private client in a matter in which the lawyer personally and substantially participated as a public employee unless the appropriate government agency gives informed consent confirmed in writing. *Rule 1.11(a)(2)*. Without such consent, the disqualified lawyer's new firm may represent the private client, but only if the lawyer (former government employee) is timely screened from any participation in the matter or sharing in the fee, and written notice of the screening procedure is sent to the government agency. *Rule 1.11(b)* see generally, *supra*, Chapter IV.F.5.

An exception to these rules arises where a party selects a lawyer to sit as a non-neutral arbitrator among several arbitrators. Under this scenario, the arbitrator is essentially an advocate and is not prohibited from subsequently representing that party on the matter involved in arbitration. *Rule 1.12(d)*.

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Note also that if the lawyer has learned confidential government information about a person acquired when the lawyer was a government lawyer, then the lawyer cannot represent a private client whose interests are adverse to that person in a matter in which the information can be used to the material disadvantage of that person. *Rule 1.11(c)*.

4. Improper Influence on Government Agency

It is professional misconduct for a lawyer to state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Responsibility or other law. *Rule 8.4(e)*. Thus, a lawyer may not state that the lawyer is close friends with a judge, public official, or governmental agent, and that the friendship will have a bearing on or influence how the matter is decided.

CHAPTER XI

MODEL CODE OF JUDICIAL CONDUCT

In 2008, the American Bar Association adopted the 2007 revised Model Code of Judicial Conduct. As of the March 2009 exam, the correct answers to questions on the MPRE involving judicial conduct will reflect the Model Code as revised. Accordingly, in this chapter, whenever we refer to "the Code," "the revised Code," or "the *CJC*," we will be referring not to the Model Rules of Professional Conduct for Lawyers, but rather to the revised Model Code of Judicial Conduct.

The most visible change in the 2008 revised Model Code of Judicial Conduct is the adoption of a new format similar to that used in the Model Rules of Professional Conduct. In that regard, the revised Code has gone from five Canons to four (essentially, Canons One and Two have been combined), with a revised Preamble explaining that judges are subject to the Code at all times, in both their personal and professional lives.

The Code's four Canons are designed to protect the public. They are intended to strike a balance between the need for an independent judiciary and the need to remove judges who do not meet the high ethical standards required of a judge. The underlying theme repeated throughout the Code is that a judge is prohibited from engaging in conduct that would appear to a reasonable person to undermine the three "I's": the judge's independence, integrity, and impartiality. Essentially, the Code discourages judges from acting in a way that might diminish public confidence in the independence, integrity, and impartiality of the judiciary. After much debate, the Preamble to the Code retains the nebulous standard that judges should avoid even "the appearance of impropriety in their professional and personal lives." *See CJC Rule 1.2*. Accordingly, the Code asks judges to accept restrictions on their own public conduct that do not apply to other citizens.

The new "Scope" section explains that use of the word "must" in the Code or its accompanying comments signifies that the Model Rule in question "is obligatory as to the conduct in question." *CJC Scope cmt. 3*. Where the Code contains a permissive term such as "may" or "should," the conduct being addressed "is committed to the . . . discretion of the judge or candidate . . . and no disciplinary action should be taken for action or inaction within the bounds of such discretion." *CJC Scope cmt. 2*.

Moreover, Section 7 of the Scope states that "[t]he Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court."

It is interesting to note that Section 6 of the Scope indicates that a transgression of the Model Rules will not automatically result in discipline. Instead, judicial disciplinary bodies are advised to consider the seriousness of the transgression, the circumstances surrounding it, whether there has been a pattern of improper activity by the judge, whether there have been any prior violations, as well as the effect of the judge's conduct on the judicial system and others. *CJC Scope cmt. 6*.

The Code imposes ethical obligations on anyone, whether or not a lawyer, who serves a judicial function, including full-time and part-time judges, justices of the peace, magistrates, special master,

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court commissioners, referees, administrative law judges, and retired judges subject to recall. *CJC Application I(B)*. Canon 4 (governing judges' political and campaign activity) applies to judicial candidates as well. *CJC Rule 4.1 cmt. 2*.

Even though *CJC Rules 3.8 and 3.11* greatly restrict a judge's ability to serve in a business entity or act as a fiduciary, the Code (*Application VI*) provides a safe harbor for newly elected or appointed judges involved in business transactions or acting as fiduciaries. To prevent hardship on the judge or adverse consequences to the beneficiary whose interests may suffer from an immediate end to the fiduciary relationship (e.g., beneficiaries of an estate, a trust, or a guardianship), the judge need not terminate those relationships until one year after the judge is appointed.

MPRE candidates should be aware that if a judge's conduct is deemed improper, then any lawyer knowingly assisting, aiding, or encouraging such conduct is also subject to discipline. In that regard, the Comments to the Model Rules of Professional Conduct caution that "[a] lawyer is required to avoid contributing to a violation" of the provisions of the Code. *MRPC § 3.5 cmt. 1*. In addition, it is professional misconduct for a lawyer to "knowingly assist a judge . . . in conduct that is a violation of applicable rules of judicial conduct" *MRPC § 8.4(f)*

CJC CANON 1

Judges Shall Promote the Independence, Integrity, and Impartiality of the Judiciary, and Shall Avoid Impropriety and the Appearance of Impropriety

A. GENERALLY

Canon 1 is the briefest of the five Canons. It requires judges to uphold the integrity and independence of the judiciary. "A judge . . . in fulfilling [the] judicial function must not only strive to insure fair treatment toward every individual who appears before him [or her], but . . . must also present the appearance of fairness and probity in his [or her] behavior as a judicial officer. If that appearance falters, the confidence of the public will naturally wane." *In re Franciscus*, 369 A.2d 1190, 1195 (Pa. 1977), cert. denied, 434 U.S. 870 (1977).

Although Canon 1 often is cited by judicial disciplinary committees as authority for disciplining judges, the conduct complained of usually violates other Canons as well. There have been cases, however, where Canon 1 is the sole basis for sanctioning a judge. For example, a part-time judge's use of judicial power to benefit his clients was held to violate only Canon 1. *In re Wireman*, 367 N.E.2d 1368 (Ind. 1977), cert. denied, 436 U.S. 904 (1978) (an acting judge pro tempore who sought special treatment and who disposed of matters in his courthouse relating to his clients was held to have violated Canon 1); *In re Tabak*, 362 N.E.2d 475 (Ind. 1977).

QUERY:

Judge was a justice of the civil court in a small community. He and his wife operated a fine apparel store located within his judicial district. In his own court, Judge filed 17 civil complaints for amounts owed to his store. Is Judge subject to discipline?

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HELD:

Yes. CJC Rule 1.2 requires a judge's conduct at all times to uphold and promote public confidence in the independence, integrity, and impartiality of the judiciary. In that regard, a judge should not only avoid impropriety, but also the appearance of impropriety. *CJC Rule 1.2*. Moreover, CJC Rule 1.3 states that "[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so." Here, Judge should not have filed civil actions in his own court but, rather, should have commenced the actions in a neighboring jurisdiction. *Matter of Haddad, 627 P.2d 221 (Az. 1981)*.

It is impossible for the Code, or this chapter, to list all conduct proscribed by Canon 1. Clearly, impermissible conduct includes acts in violation of the law, court rules, or the Code, as such acts would undermine public confidence in the judge's integrity and create the appearance of impropriety.

EXAMPLE:

A judge should not use judicial stationery to gain an advantage in a personal matter since it appears to abuse the prestige of judicial office in order to advance the judge's personal or economic interests.

EXAMPLE:

When a judge is stopped for a traffic violation, taking out her wallet visibly containing a gold judicial badge and putting it on her dashboard is improper because it uses judicial prestige to gain favorable treatment (i.e., advancing her personal interests). Even without the badge, the judge's simply alluding to her judicial status would be improper. *CJC Rule 1.3 cmt. 1*.

While a judge may use judicial stationery to write letters of recommendation "based on the judge's personal knowledge," the judge's letter should indicate that the recommendation is personal, and there must be no likelihood that the letter could be construed as an attempt to exert pressure by referencing his judicial position. *CJC Rule 1.3 cmt. 2*. Thus, a judge may write a letter of recommendation in support of her law clerk's application for new employment; the judge may also recommend a family member or a neighbor for acceptance in a law school.

EXAMPLE:

Judge Brown was disputing charges on her credit card bill. She told her secretary to call the credit department and then put the judge on the phone. The judge knew that her secretary, in making the call, would say "Judge Brown's chambers is calling, I'll put the judge on the phone right away." Here, the judge impermissibly is directing someone else to abuse the prestige of her judicial office.

EXAMPLE:

A Minnesota Supreme Court justice who was a supervisor of the state's bar exam system was removed from the bench when it was discovered that he cheated on the

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Multistate Bar Exam. The justice, while taking the Florida Bar Exam for the second time, in the office of the Bar Examiners rather than with the rest of the test-takers, consulted reference books while answering the questions. The justice failed, even with the assistance of the books.

Rejecting the justice's argument that he thought the Multistate exam was an open-book exam, a three-judge panel decided that the interests of justice demanded sanctions in the form of removal of a judge whose effectiveness had been damaged in the public view. *In re Complaint Concerning Hon. John J. Todd, 1984 Minn. App. LEXIS 3816 (Nov. 1, 1984).*

Judges have even been removed from office solely for misconduct occurring prior to becoming a judge, because the prior misconduct brought the judge's office into ill repute. *Matter of Mason, 100 N.Y.2d 56 (2003); In re Gillard, 271 N.W.2d 785 (Minn. 1978).*

B. INDEPENDENCE AND IMPROPRIETY

A judge shall not use the prestige of judicial office to advance his or her private interests, or those of others; nor shall a judge convey or permit others to convey the impression that any person or organization is in a special position to influence the judge. *CJC Rule 1.3; see CJC Rule 2.4.*

EXAMPLE:

Alpha, a lawyer, was arrested for driving while intoxicated. Alpha dated Judge's daughter. On more than one occasion, Judge attempted to persuade the District Attorney to reduce the charges against Alpha. Judge was subject to discipline because he allowed his family and social relationships to influence his judicial duties. Such conduct does not promote the public's confidence in the impartiality of the judiciary. *CJC Rule 2.4(B); Spruance v. Commission on Judicial Qualifications, 532 P.2d 1209 (Cal. 1975).*

QUERY:

Judge considered retiring from the bench and entering private practice. She was asked informally by a lawyer to consider taking a position with Law Firm Y. Two weeks later, Judge was scheduled to preside over a trial where an attorney from Law Firm Y represented the defendant. Should Judge recuse herself from the case?

HELD:

Yes. "[I]mpartiality and the appearance of impartiality could be jeopardized if lawyers whose firms were discussing a possible affiliation with the judge appeared as advocates before [her]." *N.Y. State 541 (1982)*. Note that if Judge decided not to join Law Firm Y, the fact that she once had considered potential employment with that firm would not automatically disqualify her. But, for a reasonable time thereafter, whenever the firm appears before her, she must disclose to all parties the fact that she consulted with the firm. *See ABA Opinion 200 (1940); N.Y. State 511 (1979), N.Y. State 602 (1989).*

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Note that Model Rules of Professional Conduct Section 1.12(b) prohibits a lawyer from negotiating for employment with “any person who is involved as a party or as a lawyer for a party in a matter in which [that] lawyer is participating personally and substantially as a judge or other adjudicative officer, or as an arbitrator, mediator or other third-party neutral.”

A judge is not automatically disqualified from cases involving a law firm with which one of the judge’s clerks has accepted employment, provided that the judge screens the law clerk from working on cases in which a party is represented by the clerk’s future employer. *Hunt v. American Bank & Trust Co. of Baton Rouge*, 783 F.2d 1011 (11th Cir. 1986); see also *Bartel Dental Books Co. v. Schultz*, 786 F.2d 486 (2d Cir. 1986); *MRPC* §§ 1.11(d)(2)(ii); 1.12(b). Law clerks, whose service to the court is usually limited to a one- or two-year commitment, are often aggressively recruited by law firms and are free to negotiate employment with parties and lawyers involved in matters in which the law clerk is substantially involved. The only requirement is that the clerk must advise the judge before entering negotiations. *MRPC* § 1.12(b).

Judges should also take special care when writing articles in for-profit publications. The judge should not allow anyone associated with the publication to exploit the judge’s status. When entering a contract to publish the article, the judge should retain sufficient control over the advertising of the article to prevent this exploitation.

CJC CANON 2

A Judge Shall Perform the Duties of Judicial Office Competently, Impartially, and Diligently

Canon 2 is concerned primarily with performance of a judge’s judicial duties. A judge’s judicial duties must take precedence over all personal and extrajudicial activities. *CJC Rule 2.1*. A judge shall not allow family, social, political, financial, or other relationships to influence the judge’s judicial conduct or judgment. *CJC Rule 2.4(B)*.

A. ADJUDICATIVE RESPONSIBILITIES

1. Professional Competence

In performing judicial duties, a judge shall:

1. Accept all cases assigned, except when disqualification requires recusal, *CJC Rule 2.7*; and
2. Maintain professional competence and not be swayed by partisan interests, public clamor, or fear of criticism, *CJC Rule 2.4(A)*.

2. Decorum

“A judge shall require order and decorum in proceedings before the court.” *CJC Rule 2.8(A)*.

Judges are held to a higher standard of conduct than the public at large because relatively slight improprieties by a judge may subject the entire judiciary to public criticism and rebuke.

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The Code requires judges to perform judicial duties without bias or prejudice, and without engaging in harassment through speech or conduct. *CJC Rule 2.3(B)*. Further, a judge shall not permit staff, court officers, or lawyers appearing before the judge to manifest such bias or prejudice. *CJC Rule 2.3(B) and (C)*.

The types of prohibited harassment and bias are broad, including race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. However, a judge or lawyer may refer to these factors when relevant to an issue in a proceeding. *CJC Rule 2.3(D)*.

A judge shall perform judicial duties impartially and fairly. The judge's conduct shall not display any potentially prejudicial behavior to the media, jurors, or spectators. "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers . . . and others with whom the judge deals . . . and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control." *CJC Rule 2.8(B)*.

EXAMPLE:

While presiding over a trial, a judge heard testimony from the defendant. As a manifestation of his disbelief of the defendant's testimony, the judge "created a sound commonly referred to as a 'raspberry.'" On another occasion, the judge reprimanded the defendant for coming in late to a traffic matter by presenting a "digitus impudicus" (extending the middle finger of a closed fist). The judge was suspended. *Spruance v. Commission on Judicial Qualifications, 532 P.2d 1209 (Cal. 1975)*.

As *CJC Rule 2.3 Comment 2* notes, "[e]ven facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice." The resulting bias impairs the fairness of the court proceeding, adversely reflecting on the judiciary. *CJC Rule 2.3 cmt. 1*.

EXAMPLE:

A judge was removed from office when found to have been intoxicated on the bench at least twice and for making racist comments from the bench. In describing the County Executive, the judge also used obscene and vulgar terms. *Matter of Aldrich, 58 N.Y.2d 279 (1982), reh'g denied, 59 N.Y.2d 967 (1983)*. Judges must be patient, dignified, and courteous to all who appear before the court. *CJC Rule 2.8(B)*.

EXAMPLE:

A New York judge was removed after he decided a defendant's guilt and sentence by flipping a coin; another judge was removed for asking courtroom spectators for a show of hands as to the defendant's guilt. Such conduct does not promote confidence in the judiciary. *CJC Rule 1.2*. This conduct also violates the judge's duty to apply the law in deciding cases. *CJC Rule 2.2*.

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EXAMPLE:

A judge presided over a trial of a woman charged with prostitution. In lieu of a formal opinion, the judge submitted a memorandum decision consisting of humorous verse, complete with meter and rhyme. The court censured the judge, holding that a judge should not “wisecrack” at the expense of anyone connected with a judicial proceeding. In censuring the judge, the court found that the opinion in verse impermissibly portrayed the defendant in a ludicrous or comical situation as someone to be laughed at or someone in an amusing situation. *In re Inquiry Relating to Rome*, 542 P.2d 676 (Kan. 1975).

EXAMPLE:

Although not the subject of a disciplinary proceeding, a similar outcome would be expected in the infamous case of *Lason v. State of Florida*, 12 So.2d 305 (1943). *Lason* involved the sodomy prosecution of a septuagenarian and two young girls who solicited him. The opinion, read by numerous law students, ridicules both the victims and the defendant.

Under the revised Code, judicial conduct can be construed as “harassment” if it “denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.” *CJC Rule 2.3 cmt. 3*.

We know that Model Rules of Professional Conduct *Rule 1.8(i)* prohibits a lawyer from having sexual relations with a client because of the inherent conflict of interest that arises in such a relationship. Likewise, the CJC prohibits sexual relations and harassment by a judge, such as “sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.” *CJC Rule 2.3 cmt. 4*.

3. *Ex Parte* Communications

Except in very narrow circumstances, neither a judge nor a member of her staff shall permit, initiate, or consider *ex parte* communications concerning a pending or impending matter. *CJC Rule 2.9(A)*. The judge’s guiding rule shall be to include all parties or their lawyers in any communication about the case.

CJC Rule 2.9(A)(1) authorizes a judge to consider *ex parte* communications for scheduling, administering, or emergencies that do not deal with substantive matters or issues on the merits. In the case of such communications, the judge must reasonably believe that no party will gain a procedural or tactical advantage because of the communication, ensure that all other parties are promptly notified of the communication, and give all parties an opportunity to respond. *CJC Rule 2.9(A)(1)*.

If a judge “inadvertently receives an unauthorized *ex parte* communication bearing on the substance of the matter” (an errant fax or email mistakenly sent by a party), the judge shall promptly notify all parties of its content and allow the parties an opportunity to respond. *CJC Rule 2.9(B)*.

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The Code now takes notice of special problem-solving courts, such as drug and domestic violence courts, where the law allows and even encourages judges to initiate and consider ex parte communications when authorized by law. If the law allows it, the judge may discuss, ex parte, the case and treatment results with the treatment provider, the party being treated, and the probation and social workers involved. *CJC Rule 2.9(A)(5); 2.9 cmt. 4.*

CJC Rule 2.9(A)(4) also permits a judge, with the consent of the parties, to confer separately with parties and their lawyers in an effort to mediate or settle the matter pending before the judge.

EXAMPLE:

While presiding over a civil matter, Judge accepted a memorandum of law from one party's lawyer. Judge used this memorandum in the pending civil case, but it was never filed officially with the court or presented to the adversary. Judge was subject to discipline because this was an improper ex parte communication concerning the merits of the case. *In re Dekle, 308 So.2d 5 (Fla. 1975).*

A judge may obtain the written advice of a disinterested legal expert to assist the judge in resolving a matter before the court, provided that the judge first informs the parties that the expert is to be consulted, explains the substance of the advice to be sought, and gives the parties a reasonable opportunity to object and respond to the judge's notice and the expert's advice. *CJC Rule 2.9(A)(2).*

This rule encompasses advice from lawyers, law professors, and others not participating in the proceeding. A judge need not disclose consultations with other judges in the judge's courthouse or with court personnel whose function it is to assist the judge, provided any judge consulted would not be disqualified from hearing the case because of a conflict of interest (e.g., discussions with a judge who was previously disqualified from hearing that case, or with a judge who could be called upon to hear that case if it was appealed). *CJC Rule 2.9(A)(3).* In any judge-to-judge consultation, the judge shall take reasonable measures to avoid learning facts that are not part of the court record. Likewise, the judge cannot surrender her professional responsibility to personally decide the controversy and cannot delegate that function to the fellow judge being consulted. *Id.*

CJC Rule 2.9(C) prohibits a judge from independently investigating facts. The judge should consider only the evidence presented to the court in the matter plus any facts that properly can be judicially noticed. *CJC Rule 2.9(C).*

In reaching a judicial decision on a matter, the judge must rely solely on the facts in the record (i.e., evidence presented by the parties). The one exception to this rule is that the judge may consider any indisputable fact that could properly be judicially noticed at the trial, such as legislative facts (federal and state cases and law), manifest facts (facts that can be easily verified by reference to an indisputable, highly reliable, accurate source, such as a telephone book, a calendar, internet research, or court records in the courthouse involving a prior proceeding), and notorious facts (facts so commonly known within the court's jurisdiction that they require no external proof (e.g., the Hudson River is navigable)). *Id.*

The Second Circuit Court of Appeals held that a judge could use Google internet research to survey yellow rain hats readily available to confirm the judge's innate "common sense." *United States v. Bari, 599 F.3d 176 (2d Cir. 2010).* See also, *Rowe v. Gibson, 798 F.3d 622 (7th Cir. 2015),*

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Another exception to the prohibition against judge's *ex parte* communications is where the judge seeks ethical guidance on compliance with the *CJC* and the judge's ethical responsibilities. *CJC Rule 2.9 cmt. 7*. This is similar to Rule 1.6(b)(4) of the Model Rules of Professional Conduct, which allows a lawyer to disclose confidential information to obtain legal advice about the lawyer's compliance with ethics rules. *CJC Rule 2.9 Comment 7* explains that a judge may "consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with [the] Code." Unlike a judge seeking the opinion of an expert in other areas, the judge need not (but may) disclose to the parties or their counsel that she sought ethical advice.

4. Disposition of Court Business

A judge should dispose of all court business promptly, efficiently, and fairly (e.g., motions, hearings, and trials before the court). This rule requires the judge to devote adequate time to judicial duties and to be punctual in court attendance. *CJC Rule 2.5(A) 2.5 cmt. 3*.

5. Public Comment

"A judge shall not [while a proceeding is pending or impending in any court] make any public statement that might reasonably be expected to affect the outcome or impair the fairness of [the proceeding] or make any nonpublic statement that might substantially interfere with a fair trial or hearing." *CJC Rule 2.10(A) (the "gag" rule)*. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. *CJC Rule 2.10(C)*. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. *CJC Rule 2.10(D)*. This section does not apply to proceedings "in which the judge is a litigant in a personal capacity." *CJC Rule 2.10(D)*.

In any case or controversy that may come before the court, a judge shall not make pledges or promises that are inconsistent with the judge's duty of complete fairness and impartiality. *CJC Rule 2.10(B)*.

The underlying theme of *CJC Rule 2.10* is to discourage judges from speaking with the media on pending or impending matters. An exception now allows the judge to respond, directly or through a third person, to allegations in the media or elsewhere concerning the judge's conduct in a matter. *Rule 2.10(E)*.

As stated previously, the public comment limitation does not apply if the judge is a named in a civil or criminal matter in an individual capacity. *CJC Rule 2.10(D)*. If, however, the judge is named in their official capacity (e.g., in a New York CPLR Article 78 prohibition or mandamus special proceeding), then the public comment "gag" rule applies. *CJC Rule 2.10 cmt. 2*.

If a judge, either while a judicial candidate or as a sitting judge, earlier has made public statements, other than in court proceedings or in a judicial decision, that commit or appear to commit the judge to reach a particular result in the pending matter, then the judge shall disqualify herself because her impartiality can reasonably be questioned. *CJC Rule 2.11(A)(5)*.

We will see later in this chapter that candidates running for office or appointment shall not make pledges or promises as to how they would handle a specific issue, if those statements could be construed to be partial. *CJC Rule 4.1(A)(13)*.

6. Nonpublic Acquired Information

A judge should not use or disclose nonpublic information acquired in a judicial capacity for any purpose unrelated to judicial activities (e.g., to make a profit). *CJC Rule 3.5*.

This nonpublic information includes information, commercial or otherwise, not in the record open to the public, such as evidence presented to a grand jury, communications made in chambers, and information that has been sealed from public exposure.

One exception to this rule is where the judge learns of nonpublic information containing credible evidence of a threat of violence to the judge, other court personnel, or the judge's family members. In such an instance, the judge is permitted to use and disclose such information to ameliorate the threat. *CJC Rule 3.5 cmt. 2*.

Judges can generally engage in investment and other financial activities for themselves or members of their family, including managing, buying, or selling real estate, or managing a stock portfolio. *CJC Rule 3.11 cmt. 1*. Nevertheless, the judge cannot make investment or other financial decisions based on nonpublic acquired information. *CJC Rule 3.5*.

7. Competence, Diligence, and Cooperation

The Model Rules of Professional Conduct mandate lawyer competence in undertaking legal representation of a client. *MRPC Preamble (Scope)*; *MRPC § 1.1*. Likewise, the *CJC* requires judges to perform their administrative and judicial functions competently and diligently (without procrastination and with punctuality in conducting court business). *CJC Rule 2.5(A)*. This requirement includes cooperating with other judges and court staff in the administration of the court's business. *CJC Rule 2.5(B)*.

In addition, a judge must uphold and apply the law. *CJC Rule 2.2*. Good faith errors of law or fact are to be humanly expected, and do not violate the Code. *CJC Rule 2.2 cmt. 3*. However, judges who deliberately or repeatedly refuse to follow the law are in violation of the Code.

Note that a judge's impartiality is not compromised by giving special accommodations to *pro se* parties to ensure that they receive a fair trial and an opportunity to be heard. *CJC Rule 2.2 cmt. 4*.

8. Ensuring the Right to be Heard

CJC Rule 2.6 attempts to balance a judge's interest in negotiating a settlement with a party's right to proceed by trial. Clearly, the Code permits a judge to participate in settlement negotiations, but the judge cannot be overly zealous or coercive in urging parties to settle. *CJC Rule 2.6(B)* Comment 2 sets forth six factors that a judge should consider in fostering settlement discussions:

1. whether it was the parties who suggested that the judge participate;
2. the sophistication of the parties in legal matters;
3. whether the case will be decided by the judge or by a jury if a settlement is not reached;

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4. whether the parties participating in settlement negotiations with the judge had their attorneys present;
5. whether the parties were represented by counsel at all; and
6. whether it is a civil or criminal case.

Remember that although CJC Rule 2.9(A) generally prohibits judges from participating in ex parte conversations, CJC Rule 2.9(A)(4) allows a judge, with the consent of all parties, to confer separately with each side (and their attorneys) in an attempt to settle the matter.

9. Judges Dealing With Jurors

CJC Rule 2.8(C) prohibits a judge from commending or criticizing jurors for their verdicts, other than in a written court order or opinion, to prevent impairing or prejudicing a juror's future service (i.e., implying a judicial expectation of jurors in future cases). The judge may, however, orally express appreciation to jurors for their service to the judicial system and the community.

After the trial, if permitted by law, the judge "may meet with jurors who choose to remain after trial, but should be careful not to discuss the merits of the case." *CJC Rule 2.8 cmt. 3*. This allows the judge to gain insight into the jury's experience.

B. ADMINISTRATIVE RESPONSIBILITIES

1. Generally

Frequently, judges are in a position to assign counsel and appoint special masters, foreclosure trustees, estate administrators, and guardians, who receive substantial fees for their services. The judge's administrative responsibilities may also include hiring secretaries, court staff, and bailiffs. The judge shall not approve or condone any compensation to such appointees that exceeds the fair value of such services (i.e., a reasonable fee). *CJC Rule 2.13(C)*. Consent by the parties involved, either to the appointment or to the salary involved, does not relieve the judge from his obligations under this Rule. *CJC Rule 2.13 cmt. 1*. A judge must perform administrative duties without bias or prejudice and must direct all staff members to do the same. *See CJC Rule 2.13(A)*.

A judge shall not make unnecessary appointments. Thus, judges should not appoint a special master in every case before her. The judge should first consider the complexity of the issues and the need for the appointment. *CJC Rule 2.13 (A)(2)*. Appointments must be earned on merit and made without bias. A judge shall avoid nepotism (appointment of a relative within the third degree of consanguinity of the judge, the judge's spouse or domestic partner, or the spouse or domestic partner of such relative). *CJC Rule 2.13 cmt. 2*.

The CJC prohibits the judge from appointing a lawyer if the judge knows that the lawyer or the lawyer's spouse or domestic partner has contributed to the judge's election campaign in excess of a certain amount within a certain number of years, as specified by each state adopting the code. *CJC Rule 2.13(B)*. However, this restriction does not apply if:

1. The position is uncompensated (except for out-of-pocket expenses);

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2. The lawyer is selected in rotation from a list of qualified lawyers drawn up without regard to whether the lawyers were contributors; or
3. The judge or administrative judge affirmatively determines that no other qualified lawyer is competent, able, and willing to accept the appointment. *CJC Rule 2.13(B)*.

2. Court Staff

Although the CJC applies to judges, a judge shall require that court officials and staff also uphold the integrity of the judicial system (e.g., no bias or bigotry). *CJC Rule 2.12(A)*.

Likewise, an administrative judge having supervisory authority over other judges shall take reasonable measures to ensure that the judges under her supervision are adhering to the Code. *CJC Rule 2.12(B)*.

3. Mental Disability or Impairment (Drugs or Alcohol)

Because of a number of factors including the stress inherent in the legal profession, surveys of professionals routinely find lawyers to be disproportionate abusers of alcohol and drugs. Accordingly, the revised Code includes a provision requiring judges who reasonably believe that another lawyer or judge's professional performance is being impaired by drugs, alcohol, or mental or physical infirmity to take "appropriate action" to rectify the problem. *CJC Rule 2.14*.

"Appropriate action" may consist of confronting the impaired lawyer or judge, and/or confidentially referring that person to an assistance program. *CJC Rule 2.14 cmt. 1*. It may also include notifying the person who supervises the impaired person. Depending on the seriousness of the impairment of the lawyer or judge, appropriate action may require reporting the conduct to the grievance committee. *CJC Rule 2.14 cmt. 2*.

C. DISCIPLINARY RESPONSIBILITIES

A judge having "knowledge" that another judge or lawyer has violated the Code or the Model Rules of Professional Conduct in a way that raises a substantial question as to that person's honesty, trustworthiness, or fitness as a judge or lawyer shall inform the appropriate authority. *CJC Rule 2.15(A) and (B)*. This rule mirrors the language of Model Rules of Professional Conduct Section 8.3 for lawyers reporting misconduct of other lawyers or judges.

If a judge receives information less than actual "knowledge" but "indicating a substantial likelihood" that another judge or a lawyer has committed a violation of the CJC or MRPC, the judge shall take "appropriate action." *CJC Rules 2.15(C) and (D)*. "Appropriate action" may include discussing the issue with the offending judge or lawyer, referring them to a substance abuse program, and/or reporting them to the appropriate authority. *CJC Rule 2.15 cmt. 2*.

CJC Rule 2.16 was added to the revised Code and mandates that judges "shall" cooperate and be candid with lawyers' and judges' disciplinary agencies. *CJC Rule 2.16(A)*. This Rule also prohibits judges from retaliating against persons known or believed to have cooperated in an investigation of any judge or lawyer. *CJC Rule 2.16(B)*.

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EXAMPLE:

The judicial grievance committee is investigating Judge for unethical behavior. After an investigation, the committee decides that there is insufficient evidence to sanction him. If Judge learns or suspects that Attorney filed the allegation or assisted in the investigation of Judge, then it clearly is improper for Judge to retaliate against Attorney or her client when Attorney subsequently appears in a matter before Judge in court.

D. DISQUALIFICATION

A judge shall recuse himself or herself from a proceeding in which the judge's impartiality might reasonably be questioned. *CJC Rule 2.11(A)*. One commentator said that the test of whether a judge's impartiality might reasonably be questioned is objective, not subjective. E. Wayne Thode, *The Code of Judicial Conduct: The First Five Years in the Courts*, 1977 *Utah L. Rev.* 395, 402 (1977). Under the CJC, even if a judge believes recusal is unnecessary, the judge should place on the record any pertinent information relevant to the potential disqualification. *CJC Rule 2.11 cmt. 5*. This is so even if no one in the court proceeding has made a motion to disqualify the judge.

QUERY:

What is a judge's attorney's ethical obligation if the judge refuses to make a required disclosure?

HELD:

The judge's attorney is prohibited from disclosing confidential information without the judge's consent. *MRPC § 1.6; ABA Opinion 04-433 (2004)*. Accordingly, the attorney cannot obtain informed consent from each of the affected clients as required by *MRPC* Section 1.7(b)(4). The lawyer or anyone from the lawyer's firm (*MRPC § 1.10*) then faces the ethical dilemma of impermissibly assisting the judge in violating the CJC. *MRPC § 8.4(f)*. Accordingly, the lawyer must withdraw from the representation of the judge. *Rule 1.16*.

QUERY:

Can a lawyer communicate ex parte to remind a judge of her ethical duty, or would this constitute a prohibited ex parte communication?

HELD:

MRPC Section 3.5 and *CJC* Rule 2.9(A) only prohibit judges and lawyers from participating in ex parte communications (outside the presence of the other attorneys) regarding pending or impending matters. Since the communication does not involve the merits of the case pending before the judge, the ABA Ethics Committee has held that this communication is ethically permissible.

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Must the judge's lawyer report the judge's misconduct to the appropriate disciplinary authorities? No, the lawyer's duty of confidentiality prohibits the disclosure. *MRPC* §§ 1.6, 8.3; *ABA Opinion 07-449* (2007).

A judge faced with a potential ground for disqualification should consider how their participation in a case looks to the average person on the street. Disqualification should follow if a reasonable person, aware of all relevant circumstances, would doubt the judge's impartiality. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir. 1980), cert. denied, 449 U.S. 820 (1980). Regardless of whether a motion is made, a judge shall not sit on a case in which the judge's impartiality might reasonably be questioned. *CJC Rule 2.11(A)*.

Where an attorney appearing before the judge was running the judge's ongoing re-election campaign, the appellate court held that a reasonable apprehension as to the judge's impartiality resulted, and the judge should have recused himself from the case. *Caleffie v. Vitale*, 488 So.2d 627 (Fla. App. 1986); 65 A.L.R. 4th 67 (1986).

QUERY:

In a newspaper article, Judge spoke in his capacity as Chief Judge about the need for tighter security and more guards in the federal court. The story quoted Judge as speaking to Senator X about this matter. Directly above this story was another story about a criminal trial over which Judge presided. Senator X was a witness in that trial. Should the defendant's request to disqualify the judge be granted?

HELD:

No. A reasonable person would not conclude that Judge was partial to the witness, Senator X. The placement of the stories was merely coincidental. *U.S. v. Poludniak*, 657 F.2d 948 (8th Cir. 1981).

1. Personal Bias or Prejudice

If a judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts involved in the proceeding, the judge shall withdraw. *CJC Rule 2.11(A)(1)*.

The United States Supreme Court has ruled that judges cannot be disqualified for bias because of their rulings or their remarks during the trial unless those statements reveal "a deep-seated favoritism or antagonism that would make a fair judgment impossible." Judicial remarks during a trial "that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. U.S.*, 510 U.S. 540, 555 (1994).

EXAMPLE:

When a judge is being represented by an attorney, and that attorney or a member of that attorney's firm simultaneously appears before the judge on an unrelated matter, the judge must recuse himself from handling that case if he maintains a bias or prejudice, either in favor of or against, his lawyer. *ABA Opinion 07-449* (2007); *ABA*

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Informal Opinion 1477 (1987). Bias is a mandatory nonwaivable disqualification under CJC Rule 2.11(A)(1).

A judge should recuse herself from matters involving her personal attorney for two years after the representation has ceased. *N.Y. Advisory Commission on Judicial Conduct Opinion 06-22*. In 2008, New York's Commission on Judicial Conduct publicly censured a judge because it was "manifestly improper for a judge to sit on a case in which the judge's personal attorney appears, regardless of the nature of the case." *New York State Commission on Judicial Conduct*, <http://www.scjc.state.ny.us/Determinations/A/ambrecht.htm>.

The New York State Bar Association's Ethics Committee has taken the position that a judge is not per se disqualified from hearing a case involving a lawyer who *formerly* represented the judge. Instead, the judge must look at the nature of the former representation (e.g., whether the case was a house closing or a contested matrimonial action), the length of time that has passed since the representation, and whether the parties have expressly waived disqualification.

The fact that the judge may be acquainted with a crime victim does not automatically disqualify the judge from presiding over a trial of the victim's attacker. *Scogin v. State*, 227 S.E.2d 780 (Ga. 1976). Also, recusal is not automatically required where the partners or associates of a lawyer who formerly represented a judge appear before that judge. Again, the standard to be used by a judge in determining whether to disqualify himself or herself is whether, by presiding over a matter, his or her impartiality might reasonably be questioned. *N.Y. State 574 (1986)*; *ABA Informal Opinion 1524 (1987)*.

In *U.S. v. Hollister*, 746 F.2d 420 (8th Cir. 1984), the court found no reversible error in the trial judge's denial of defendant's motion to disqualify the judge in the absence of bias or favoritism, even though the prosecuting attorney had served as the trial judge's law clerk only three months earlier. The court nevertheless proposed a one-year recusal period following the end of judicial clerkships before a clerk may represent a party in a matter before the judge. Remember that the Model Rules of Professional Conduct Section 1.12(c) prohibit a lawyer from representing anyone in connection with a matter in which the lawyer "participated personally and substantially" as a law clerk to a judge, unless all parties to the proceeding "consent after consultation." Moreover, no one in the lawyer's law firm can step in for the former law clerk unless the clerk is screened from further participation in the matter.

Judges are also prohibited from belonging to groups that discriminate. This topic is discussed in depth under Canon 3.

2. Previous Participation

A judge shall withdraw from a matter if they previously acted as a lawyer or material witness in that matter, or if a lawyer with whom the judge previously practiced law acted as lawyer or witness in the matter during their association. *CJC Rule 2.11(A)(6)*.

Just as judges are disqualified from sitting on cases in which they were previously involved as private or government lawyers, judges are likewise disqualified from sitting on cases in which they previously participated as a judge in another court. *CJC Rule 2.11(A)(6)*. Thus, a judge who is elected to or sits by designation on an appellate court cannot hear a case over which she presided in

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a lower court. This rule does not prohibit a member of an appellate court panel from rehearing the same case en banc where all the judges of the appellate court agree to rehear the case.

Note that the converse of this rule also applies: if an appellate judge remands a case, and that appellate court judge is designated temporarily to hear cases in the lower court, the judge cannot hear the case in which she previously participated as an appellate judge.

The Fifth Circuit held that an appellate court judge should have recused himself in a criminal appeal where the judge was a former prosecutor and was named in that capacity on the State's brief against the defendant. It was immaterial that the judge did not, in fact, participate in the defendant's prosecution, and that his name appeared on the brief only as a matter of protocol. The court agreed that the defendant was justified in feeling that his appeal was unfairly being decided by a judge who played a part in his earlier prosecution. In the eyes of the public, the court reasoned, the impartiality of justice was compromised. *Bradshaw v. McCotter*, 785 F.2d 1327 (5th Cir. 1986).

A judge, 26 years earlier, as a district attorney, approved, the trial prosecutor's request to seek the death penalty for the defendant. When the defendant's post-conviction case came up for appellate review before the former district attorney who was not an appellate Judge, he declined to recuse himself and vacated the lower court's granting of a new death penalty hearing.

This, said the U.S. Supreme Court was a due process violation since there is an impermissible risk of bias when a judge earlier had significant, personal involvement as a prosecutor in a critical discussion regarding the defendant's case. Such a "structural error" was "not amenable" to a harmless error doctrine, thus it was irrelevant whether the judge's vote was necessary to dispose of the case. *Williams v. Pennsylvania*, 136 S.Ct. 1899 (U.S. 2016).

The ABA held that a recently appointed judge was not disqualified from a case solely because an associate in the judge's old law firm appeared before the judge on a new matter. *ABA Informal Opinion 1524* (1987). "Most authorities which have interpreted the disqualification requirement for federal judges under 28 U.S.C. 455(a) agree that a period of one or two years for disqualification after expiration of a professional association with a participant in a trial is appropriate." *Id.*

3. Financial Interest

A judge shall disqualify themselves from a matter if the judge, personally or as a fiduciary, or the judge's spouse, domestic partner, child, or parent residing anywhere, or any other member of the judge's family residing in the judge's household, has an economic interest that could be substantially affected by the outcome of the matter. *CJC Rule 2.11(A)(3)*. "Economic interest" means ownership of a legal or equitable interest that is more than *de minimis*, or a relationship such as a director, advisor, or other participant in the affairs of a party. *CJC Rule 2.11 cmt. 6*.

The mere fact that a judge invests in a mutual fund that owns stock of a party appearing before the judge does not disqualify the judge, unless the judge participates in the management of the fund or the judge's decision could substantially affect the value of that mutual fund interest. *CJC Rule 2.11 cmt. 6(1)*. Similarly, a judge or a member of the judge's family (the judge's spouse, domestic partner, parent or child) holding office in a charitable or religious, fraternal, civil or educational organization, which organization holds such securities, does not create an "economic interest." *CJC Rule 2.11 cmt. 6(2)*.

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The financial interest of a policyholder in a mutual insurance company or a deposit in a financial institution or credit union is not an economic interest in the organization unless the judge's decision could substantially affect the value of that interest. *CJC Rule 2.11 cmt. 6(3)*. Furthermore, ownership of government securities is not a disqualifying interest in a matter involving that government entity, unless the outcome of the case could substantially affect the value of those securities. *CJC Rule 2.11 cmt. 6(4)*.

4. Relatives

A judge's recusal is mandated if the judge or judge's spouse, domestic partner, or relative within the third degree of consanguinity is:

1. A party to the proceeding, or an officer, director, or trustee of a party;
2. Acting as a lawyer in the proceeding;
3. Known by the judge to have more than a de minimis interest that could be substantially affected by the proceeding; or
4. Likely to be a material witness in the proceeding. *CJC Rule 2.11(A)(2)*.

The third degree of consanguinity encompasses great-grandparents, grandparents, parents, siblings, children, grandchildren, great-grandchildren, uncles, aunts, nephews, and nieces. *See CJC Terminology: "Third degree of relationship."*

If a party or a lawyer in the proceeding is a judge's cousin, the judge is not necessarily disqualified, provided the cousin is not treated as a member of the judge's family and does not reside in the judge's household.

Comment 4 to CJC Rule 2.11 notes that the mere fact that a lawyer appearing before the judge is affiliated with a law firm with which a close relative of the judge is employed does not, by itself, warrant disqualification of the judge. If some additional disqualifying factor exists (e.g., the judge's relative has an interest in the law firm that could be substantially affected by the proceeding before the judge), then the judge shall disqualify herself. *CJC Rule 2.11(A)(2)(c)*.

QUERY:

Judge was assigned to preside over a complex commercial matter involving millions of dollars in claims. Judge's brother was a member of the law firm that represented the plaintiff. Judge's brother did not participate in the trial of the case. Must Judge disqualify himself?

HELD:

The fact that a lawyer appearing before the judge is from a law firm with which a relative of the judge is affiliated does not disqualify the judge under the "relative" disqualification rules. Disqualification may be required if circumstances exist such that "the judge's impartiality might reasonably be questioned" or the relative could be "substantially affected by the outcome of the proceeding." *CJC Rule 2.11(A)*.

5. Prior Campaign Contributions

Unlike federal judges, who are appointed by the President and confirmed by the Senate, state judges in a majority of states are elected by popular election. If a judge knows or learns by way of a disqualification motion that a party, a party's lawyer, or the lawyer's law firm has, within a period of time determined by each state, contributed to the judge's campaign in an excess of a specified amount, which will be different for an individual or an entity (e.g., a corporate party), then the judge must recuse himself from handling the case. Reasonable amounts will not require the judge's recusal, but large amounts may require disqualification. *CJC Rule 2.11(A)(4)*.

EXAMPLE:

In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), while a \$50 million award was pending on appeal in the West Virginia high court, a judicial election was held in which the president of the coal company *indirectly* contributed \$3 million to one of the candidates (more than all contributions to the other candidate combined). The coal candidate was elected and he refused to recuse himself from the coal case based on conflict of interest, and, in a three-to-two decision, the jury verdict against the coal company was reversed. The U.S. Supreme Court reversed the West Virginia appellate court, by holding the judge's refusal to recuse himself was a due process violation. "The inquiry is an objective one. The Court asks not whether they judge is actually, subjectively biased, but whether the average judge in this position is [objectively] 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at 884.

6. Remittal of Disqualification

Except where the judge has a personal bias or prejudice against a party (which is non-waivable), a judge's disqualification may be remitted (i.e., waived by the parties). *CJC Rule 2.11(C)*. The judge may disclose the basis for the potential disqualification on the record, and may suggest that the parties consider waiving the disqualification. If the parties and lawyers unanimously agree, outside the presence of the judge and court personnel, they can waive disqualification of the judge. Likewise, the judge may not seek, solicit, or hear comment on possible remittal of the disqualification unless all attorneys involved have consulted and unanimously propose remittal. The agreement shall be set forth in the record of the proceeding. Note that the judge cannot participate in the remittal discussions.

For cases pending in federal court, federal law has no statute for waiving or remitting the disqualification, so the federal judge must disqualify herself in any proceeding in which her impartiality might reasonably be questioned. *28 U.S.C. 455(a)*.

7. Rule of Necessity

By decisional law, the "Rule of Necessity" may override the rules for disqualification. In a proceeding requiring immediate judicial activity (a motion for a temporary restraining order or an application for an immediate search or arrest warrant application) where no other judge is available, then even though the judge involved would otherwise be disqualified because the judge's impartiality might reasonably be questioned, the judge may still preside over a case due to necessity.

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CJC Rule 2.11 cmt. 3; New York State Ass’n of Criminal Defense Lawyers v. Kaye, 95 N.Y.2d 556 (2000). For example, this occurs when:

1. A judge reviews and interprets a statute on judicial salaries, as all other judges would likewise be disqualified and there is no other impartial judicial body able to hear the case. *Matter of Maron v. Silver, 14 N.Y.3d 230 (2009);*
2. A judge reviews an issue involving the state bar association requiring mandatory membership of all lawyers, including judges; or
3. The judge is the only judge available in a matter requiring immediate judicial action. Here, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable, provided such reference is possible.

CJC CANON 3

A Judge Shall Conduct the Judge’s Personal and Extra-Judicial Activities to Minimize the Risk of Conflict with the Obligations of Judicial Office

A. EXTRA-JUDICIAL ACTIVITIES GENERALLY

The opening paragraph of CJC Rule 3.1 lists prohibited extra-judicial activities and conduct that could interfere with a judge’s independence, impartiality, and integrity:

1. Activities that could cast “reasonable” doubt on a judge’s integrity, independence, or impartiality as a judge. This includes off-the-bench expressions (jokes or remarks) of bias on the basis of race, sex, religion, national origin, age, disability, sexual orientation, or socioeconomic status. However, remarks about the judge’s favorite sports team would not violate this rule because those types of remarks would not cast reasonable doubt on a judge’s capacity to act impartially;
2. Activities that could interfere with the proper performance of judicial duties. *CJC Rule 3.1(A);*
3. Activities that would lead to frequent disqualification of the judge;
4. Conduct that would be perceived as coercive to a reasonable person. *CJC Rule 3.1(D);* and
5. Activities involving the use of court facilities, resources, or personnel except for incidental uses for law related events. For example, the judge could not volunteer the use of a courtroom for a meeting of an extrajudicial organization to which the judge belongs since it shows partiality to one group over another (the judge providing access to facilities that are closed to others). On the other hand, a law-related incidental use of court facilities is permitted, e.g., holding a high school moot court competition in the courtroom or holding a bar association committee meeting in the judge’s chambers.

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A judge may speak, write, lecture, teach, and participate in activities concerning the law, the legal system, and the administration of justice. Thus, a judge may teach at a law school or participate in bar association activities, judicial conferences, or in other organizations dedicated to improving the law. The activities permitted in this area are broad since they concern the law, the legal system, and the administration of justice. The judge may also teach, write, speak, and participate in non-legal subjects and activities, such as “educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.” *CJC Rule 3.1 cmt. 1.*

A judge may voluntarily appear at an executive or legislative public hearing, but only with respect to matters:

1. concerning the law, the legal system, and the administration of justice. For example, a judge may appear at a public hearing concerning an increase in the judiciary budget or additional court space. *N.Y. Advisory Committee on Judicial Ethics Opinion 129 (1989)*. Also, the judge may speak and write on the need to revise substantive or procedural law. *CJC Rule 3.2*;
2. where the judge has acquired knowledge or expertise in the course of their judicial duties;
3. where the judge acted pro se in the judge’s own legal or economic interest, or when the judge is acting in a fiduciary capacity. “[I]t would be . . . unfair . . . to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens In engaging in such activities, however, judges must not refer to their judicial positions . . . to avoid using the prestige of judicial office.” *CJC Rule 3.2 cmt. 3*. For example, the judge may appear and testify at a zoning board hearing involving a zoning variance that would affect the judge’s home; and
4. where the judge is subpoenaed to testify at a hearing or a trial. In these circumstances, the judge is not considered to be voluntarily lending the prestige of her judicial office to advance another’s interest and thus may testify. Moreover, disobeying a subpoena could subject the judge to discipline. While a judge must appear if subpoenaed, the judge “should” discourage a party from requiring the judge to appear in the action as a character witness. *CJC Rule 3.3 cmt. 1*. A judge shall not *voluntarily* testify as a character witness for another at a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of someone involved in a legal proceeding. This is deemed to be using the prestige of judicial office to advance the interests of another. *CJC Rule 3.3*

A judge is permitted to represent a county, state, or locality on ceremonial occasions (e.g., Law Day) or in connection with historical, educational, or cultural activities. *CJC Rule 3.4*.

CJC Rule 3.4 prohibits a judge from accepting any government appointment or position (membership on a committee, board, or commission) unless it concerns the improvement of the law, legal system, or the administration of justice. This is necessary to prevent an unconstitutional violation of the separation of powers doctrine and to ensure the impartiality of judges. *In re President’s Commission on Organized Crime (Scaduto)*, 763 F.2d 1191 (11th Cir. 1985); *cf. In re President’s Commission on Organized Crime (Scarfo)*, 783 F.2d 370 (3d Cir. 1986).

B. CIVIC, EDUCATIONAL, RELIGIOUS, OR CHARITABLE ACTIVITIES

A judge may serve as an officer, director, trustee, or non-legal advisor for an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice, as well as for an “educational, religious, charitable, fraternal or civic organization [] not conducted for profit.” *CJC Rule 3.7(A)*. For example, a judge may participate in bar associations, judicial conferences, and other organizations dedicated to improving the law, as well as not-for-profit civil, religious, and fraternal organizations. Such participation is subject always to the requirement that the judge’s participation does not reflect adversely upon the judge’s impartiality or interfere with the performance of judicial duties.

CJC Rule 3.4 concerns *governmental* appointments, whereas CJC Rule 3.7(A) addresses a judge’s service in *nongovernmental* positions.

CJC Rule 3.7(A)(6) permits a judge to serve on the board of a private or public organization as long as it is not conducted for profit. For example, a judge could serve as a trustee of a public or private university.

However, a judge is subject to the following limitations:

1. A judge shall not act as an officer, director, trustee, or non-legal advisor if the organization is likely to be engaged in either:
 - a. proceedings that would ordinarily come before the judge (this allows, for example, a state court judge to participate in an organization that might frequently engage in litigation in the federal courts but seldom in state courts); or
 - b. frequent adversarial proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member. *CJC Rule 3.7(A)(6)*.
2. A judge must not personally participate in fund-raising on behalf of the organization, but may participate and assist in planning fund-raising events and strategies. *CJC Rule 3.7(A)(1)*. Thus, if the organization has a fund-raising event, “a judge could serve as an usher or a food server or preparer” because such activities are not solicitation and do not present an element of coercion or abuse of the prestige of judicial office. *CJC Rule 3.7 cmt. 3*. The Code no longer prohibits a judge from giving investment advice because it is unrealistic to expect a board member or trustee not to participate in investment decisions.
3. A judge shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation, e.g., a judge must not be a speaker or a guest of honor at a fund-raising event for a civic or charitable organization, but the judge may do so for fund-raising or membership solicitation purposes if the event concerns the law, the legal system, or the administration of justice. *CJC Rule 3.7(A)(3) and (4)*.

EXAMPLE:

Although CJC § 3.7(A)(2) prohibits a judge from personally soliciting whether by telephone, letter, or other means of communication, contributions on behalf of a

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non-profit organization or governmental entity from anyone other than a family member or another judge over whom the soliciting judge “does not exercise supervisory or appellate authority,” Rule 3.7(B) allows a judge to send a letter on judiciary stationery to the state’s unified bar members encouraging all layers to perform *pro bono* legal services. *ABA Formal Op. 470 (2015)*.

A judge who serves as president of a charitable foundation, however, may deliver the president’s report to the biennial convention. The delivery of the report does not become a “fund-raising event” merely because the judge reports on fund-raising activities. “The ultimate question is whether the [meeting] at which the report is given . . . is a “fund-raising event,” i.e., whether the event itself will produce funds for the organization. *ABA Informal Opinion 1525 (1988)*. Note that mere attendance at a fund-raising event is permissible. *CJC Rule 3.7 cmt. 3*.

A judge is permitted to solicit contributions from a very limited group: family members and fellow judges over whom the soliciting judge does not have supervisory or appellate authority. *CJC Rule 3.7(A)(3)*. A judge may solicit contributions from family members because, unlike when a judge solicits a lawyer, the element of perceived coercion is lacking and the person responding to the solicitation cannot be perceived as currying favor with the judge.

Judges may solicit lawyers to join an organization relating to the law or its improvement (bar associations) but may not solicit members in non-law related organizations (i.e., The Red Cross, American Cancer Association, or the Rotary).

Judges are permitted to make recommendations to public and private fund granting organizations on projects, but only if the organization is concerned with the law, the legal system, or the administration of justice. *CJC Rule 3.7(A)(5)*.

4. A judge shall not serve as a legal adviser to a civic or charitable organization. *CJC Rule 3.7(A)(1)*.
5. A judge may be listed as an officer, director, or trustee on the letterhead of an organization provided other officers, directors, or trustees are also listed. Reference to the judge’s office is permissible if comparable designations are referenced for other listed persons.
6. A judge is prohibited from personally soliciting new members where membership is essentially a fund-raising mechanism or where such solicitation might reasonably be perceived as coercive.

Judicial organizations frequently depend on the solicitation of funds for their existence. A judge may solicit membership or funds from other judges over whom the judge does not exercise supervisory or appellate authority. Absent the authority over the solicited judge, there is less chance to exercise improper influence.

A judge may solicit other persons for *membership* in law related organizations only, even if the solicited person is likely to appear before the court on which the judge serves. *Rule 3.7(A)(3)*.

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New to the revised Code is CJC Rule 3.1(D), which prohibits judges from engaging in coercive conduct in either a judicial or extrajudicial capacity. For example, especially in small communities where there is only one judge or a few judges and a lawyer must maintain good relations with a judge, a judge may not coerce a lawyer to join a law related organization. Thus, where solicitation of membership by a judge is permitted under CJC Rule 3.7(A)(3) for organizations “concerned with the law, the legal system or the administration of justice,” the judge must avoid subtle or overt conduct that could reasonably be construed as coercing others into participating in extrajudicial activities favored by the judge.

The judge must make reasonable efforts to ensure that members of the judge’s staff do not do indirectly what the judge may not do directly.

C. FINANCIAL ACTIVITIES

Business activities of a judge are limited by the judge’s judicial office. The judge may not engage in financial activities that may reasonably be perceived as exploiting the judicial office, nor is the judge permitted to engage in frequent transactions or continuing business relationships with lawyers or other persons who are likely to come before the court in which the judge serves. *CJC Rule 3.11(C)(3)*.

Generally, a judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity, except that a judge may manage and participate in:

1. a business closely held by the judge or members of the judge’s family (for rural judges, this may mean that the judge can participate in the family farm or ranch); or
2. passive business activities primarily related to investing the financial resources of the judge or members of the judge’s family. This allows judges to manage personal and family investments including real estate. A judge is also permitted to make investments as a limited partner. *CJC Rule 3.11(B)(1)*.

While these exceptions appear to open a large area of extra-judicial financial activity for a judge, such business participation is prohibited if it would entail significant time away from judicial activities, or the business entity would appear frequently in the judge’s court. *CJC Rule 3.11(C)(1)*.

The judge must manage business investments to minimize the number of cases in which the judge must recuse himself or herself. *CJC Rule 3.11(C)(2)*. As soon as the judge can do so “without serious financial detriment,” the judge must purge his or her investment portfolio of interests that might require frequent disqualification. *CJC Rules 3.11 cmt. 2*.

QUERY:

A judge is offered the position of “honorary director” of a local commercial bank. As an honorary director, the judge would attend meetings of the bank and would express opinions on the bank’s activities. The judge would not be asked to vote on bank policy. Is it proper for the judge to accept this position?

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HELD:

No. CJC Rule 3.11(B) forbids a judge to serve as a director in such a non-closely held business. *ABA Informal Opinion 1385 (1977)*. “A certain amount of publicity is given by all banks to the personnel of their boards of directors. Accordingly, publicity would be given to the fact that the bank had a judge on its board. This might create reasonable suspicion that the judge was utilizing the prestige of his office to persuade others to patronize the bank. The Canon condemns such conduct.” *ABA Formal Opinion 254 (1943)*; *ABA Informal Opinion 1385 (1977)*.

“[I]t would be improper for a judge to use his or her official title or appear in judicial robes in business advertising.” *CJC Rule 3.11 cmt. 1*.

QUERY:

May a judge sit on a co-op or condominium board?

HELD:

No. A judge may not act as a director of a condominium association because of the high volume of condominium litigation and the many diverse and adverse interests in this type of association. *Florida Bar Opinion 7 (1981)*; but cf. *New York State Bar Association Advisory Committee on Judicial Ethics Opinion 133 (1989)* (permitting a judge to serve on the board of directors of a cooperative in which the judge resides, provided the judge does not serve as legal advisor and does not participate in decisions that are likely to lead to litigation).

D. EXTRA-JUDICIAL INCOME

A judge may receive compensation for quasi-judicial and extrajudicial activities permitted by the *CJC*, including honoraria, stipends, fees, wages, salaries, royalties or other compensation for speaking, teaching, writing, and other extrajudicial activities, as long as the compensation is reasonable and commensurate with the task performed. *CJC Rule 3.12*; *3.12 cmt. 1*. However, the judge may not accept such compensation if the payment or amount “would appear to a reasonable person to undermine the judge’s independence, integrity or impartiality.”

A judge may be reimbursed for the actual cost of travel, food, and lodging in connection with any quasi-judicial and extrajudicial activity. Anything beyond reimbursement is considered to be compensation. *CJC Rule 3.14* and *CJC Rule 3.15*.

A judge must report to the court clerk and have posted on the court’s website the date, place, nature, and amount of compensation received, as well as the name of the person who paid the compensation for any quasi-judicial or extrajudicial activity. *CJC Rule 3.15*. It is not sufficient simply to report this income on the judge’s personal income tax return.

E. GIFTS, LOANS, OR BEQUESTS TO A JUDGE

Whenever a gift is made to a judge, a risk arises that the gift could be perceived as being given with the intent to influence the judge and compromise his or her independence and impartiality.

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Under CJC Rule 3.13, a judge shall not accept, and shall urge members of the judge's family residing in the judge's house not to accept, any favor, gift, loan, bequest, benefit, or other thing of value if a reasonable person could construe such acceptance to undermine the judge's independence, integrity, or impartiality. *CJC Rule 3.13(A)*.

CJC Rule 3.13 restrictions on judicial gift giving do not apply to campaign contributions (which are actually gifts); these donations are governed by CJC Rule 4.3 and 4.4, *infra*.

CJC Rule 3.13 is broken down into three sections. Paragraph (A) prohibits acceptance of all gifts or things of value that can be perceived as compromising the judge's impartiality, independence, or integrity. Paragraph (B) lists items that the judge may accept without public reporting. Paragraph (C) lists items that the judge may accept, but which must be reported publicly by the judge.

EXAMPLE:

The American Bar Association concluded that it would be improper for a judge to accept a plaque, even though it was of "no significant monetary value," if it was presented as an award by "a specialized bar association" whose members "customarily represent the same side of cases in litigation," such as prosecutors, asbestos plaintiffs' lawyers, Legal Aid, etc. *ABA Informal Opinion 86-1516 (1986)*. An award given by such a special-interest bar association may "raise an appearance of impropriety, even though no actual impropriety or influence upon a judge may exist." *Id.* "While the Model Code of Judicial Conduct specifically permits a judge to accept . . . without reporting such acceptance items with little intrinsic value, such as plaques" . . . a plaque from such a specialized bar association would still be prohibited as it "would appear . . . to undermine the judge's independence, integrity, or impartiality." *CJC Rule 3.13(A), (B)*.

QUERY:

Judge X was the guest of honor at a bar association testimonial dinner. At the dinner, the judge accepted a gift of \$25,000, collected mostly from lawyers attending the dinner. Was this proper?

HELD:

No. The gift was improper because of its amount and because the contributors were likely to appear before the judge, giving rise to the appearance that the judge's impartiality may be compromised. The judge should not have accepted the gift, and, in this matter, the judge was publicly censured and required to turn the money over to the state. *In re Dandridge, 337 A.2d 885 (Pa. 1975)*.

Unless prohibited by law or where acceptance would appear to a reasonable person to undermine the judge's independence, impartiality, or integrity, the judge may, without publicly reporting it, accept the following:

1. items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;

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2. a gift, loan, favor, or bequest from a relative or close personal friend whose appearance or interest in a case would, in any event, require the judge's disqualification under CJC Rule 2.11;
3. ordinary social hospitality;
4. loans from lending institutions on the same terms available to the public;
5. commercial or financial opportunities, including special pricing and discounts, that are available to the general public;
6. random drawings or prizes awarded in contest open to non-judges;
7. scholarships, fellowships, or similar awards available on the same terms to non-judges;
8. books, journals, audiovisual materials, and other resource material supplied by publishers on a complimentary basis for official use;
9. gifts, awards, or benefits to a judge's spouse, domestic partner, or family member in connection with that person's business or professional activity, even though the judge coincidentally benefitted from it, provided the award does not create the perception that its issuance is intended to influence the judge's impartiality and independence; and
10. a special occasion gift (e.g., wedding, anniversary) to a judge or family member from a friend or family member provided the gift is commensurate with the occasion and relationship. *CJC Rule 3.13(B)*.

Unless prohibited by law, a judge is permitted to accept the following, as long as they are publicly reported pursuant to Rule 3.15:

1. a gift incidental to a public testimonial;
2. a free invitation for the judge and judge's spouse, domestic partner, or guest to attend:
 - a. a bar- or law-related function or other event;
 - b. an event connected with the judge's permitted educational, religious, charitable, fraternal, or civic activities, provided the invitation is also extended to non-judges engaged in similar activities. If free tickets are given to judges only and not other charitable board members, the CJC requires the judge to decline; and
3. gifts, loans, bequests, or other things of value from a party, a lawyer, or other person whose interests have previously appeared before or are likely to come before the judge. *CJC Rule 3.13(C)*

F. PUBLIC REPORTING OF GIFTS AND SEMINAR FEES

CJC Rule 3.15 requires a judge to publicly report, in a document filed with the clerk of the court

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and posted by the court on its website, the following:

1. Compensation for the judge's extrajudicial activities;
2. Gifts and other things of value, unless the value (or the aggregate amount from the same donor) in the same calendar year did not exceed an amount fixed by each jurisdiction [the 1990 Model Code had a \$150 limit]); and
3. Registration or tuition waiver and expense reimbursement (again, each jurisdiction will fix the amount that will trigger public reporting).

Whenever public reporting is required, the judge must disclose the date, place, amount, and source of the benefit. *CJC Rule 3.15(B)*.

The reporting must be done at least annually, except for registration waivers and reimbursement of out-of-pocket expenses, which must be reported within 30 days after the program's conclusion. *CJC Rule 3.15(C)*.

G. TUITION WAIVER AND REIMBURSEMENT OF EXPENSES TO ATTEND SEMINARS

Judges who sit on religious, charitable, civic, or educational boards are frequently invited to dinners, seminars, award ceremonies, and similar events. Likewise, a judge's participation in bar association and continuing legal educational events, both as participant and teacher, is encouraged. Seminar registration or tuition charges associated with the judge's participation in these events can be waived and actual out-of-pocket expenses (travel, food, and lodging) can be reimbursed to a judge subject to CJC Rule 3.1 (a judge's extrajudicial activities) and CJC Rule 3.13(A) (prohibiting a judge from accepting anything of value if a reasonable person would view it as compromising the judge's impartiality, integrity, and independence).

Any waiver of charges or reimbursement of costs accepted by the judge or the judge's spouse, domestic partner, or guest must be publicly reported within 30 days after the event.

Comment 3 of CJC Rule 3.14 lists eight factors to consider when determining whether a fee waiver or expense reimbursement could be construed by the reasonable person as compromising the judge's impartiality, integrity, and independence:

1. Is the sponsor a trade association or for-profit entity rather than an accredited educational or bar association?
2. Is the event's funding derived from numerous contributions or from a single source?
3. Is the seminar's content related to the subject matter of litigation pending or impending before the judge?
4. Is the activity primarily educational or recreational and are its cost and expenses comparable to similar events sponsored by bar associations or similar groups? For example, if it is primarily a weekend golf outing with only one hour of class interaction per

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day at a four-star hotel sponsored by a pharmaceutical company, then the judge must not accept any registration waiver or cost reimbursement, since it “would appear to a reasonable person to undermine the judge’s independence, integrity or impartiality.” *CJC Rule 3.13(A)*.

5. Is information on the event and its funding readily available upon request?
6. Is the sponsor or the source of the funding associated with a particular interest group or party appearing or likely to appear in the judge’s court, thus requiring the disqualification of the judge under *CJC Rule 2.11*?
7. Will only one viewpoint be presented or will different viewpoints be presented?
8. Has a broad range of judicial and nonjudicial participants been invited and was the program designed specifically for judges?

H. FIDUCIARY ACTIVITIES

Generally, a judge should not serve in a fiduciary position, e.g., as a trustee, guardian, or executor. However, a judge may do so for a family member provided that the fiduciary activities do not interfere with the judge’s proper performance of judicial duties. If the fiduciary role will likely involve proceedings in the judge’s court or in a court under the judge’s jurisdiction, the judge should decline the fiduciary role. *CJC Rule 3.8*.

A newly elected or appointed judge who was already serving in a fiduciary position shall comply with *CJC Rule 3.8* as soon as reasonably practicable but in no event later than a time period set by each jurisdiction [the Code suggests one year]. *CJC Rule 3.8(D; Application (VI))*.

I. ARBITRATION OR MEDIATION

A judge shall not act as an arbitrator or mediator unless otherwise permitted by law, e.g., a part-time judge is so permitted (*see M, infra*). *CJC Rule 3.9*.

CJC Rule 3.9 prohibits judges from engaging in dispute resolution outside their ordinary judicial duties, whether compensated or not, because:

1. the underlying dispute could come before the court;
2. the judge’s judicial office could be exploited; and
3. judicial time could be diverted.

J. PRACTICE OF LAW

A judge shall not practice law. *CJC Rule 3.10*. This limitation, however, does not prohibit a judge from acting pro se in litigation or other legal matters, including pro se appearances before legislative or executive bodies.

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A judge may also give uncompensated legal advice and review or draft documents for members of the judge's family, but the judge may not serve as the family member's lawyer in any forum. *Id.*

To avoid abusing the prestige of judicial office, the judge shall not use judicial stationery when performing such permissible legal tasks.

Part-time judges are permitted to practice law, but not in the court where the judge sits part-time. *Application (III-V).*

K. MEMBERSHIP IN CLUBS THAT DISCRIMINATE

Judges are prohibited from belonging to groups that discriminate, such as all-male country or social clubs. *CJC Rule 3.6.* The Code distinguishes between a judge's membership in groups that discriminate invidiously by excluding individuals who would otherwise be eligible for membership solely on the basis of race, gender, etc., and those organizations that select their membership solely on the basis of ethnicity or religion where the membership criteria is not constitutionally prohibited (e.g., the Sons of Italy, which limits membership to people of Italian heritage, or B'nai Brith, which limits membership to individuals of the Jewish faith)). *CJC Rule 3.6 cmt. 2.* "A judge's membership in a religious organization as a lawful exercise of [the First Amendment] is not a violation of this rule." *CJC Rule 3.6 cmt. 4.*

The old CJC gave judges who were members of such clubs a one-year safe harbor to work within the club to change its invidious discrimination. This safe harbor was not carried forward in the revised CJC, which outright prohibits judges from belonging to such clubs. The judge must resign immediately from the club. *CJC Rule 3.6 cmt. 3.*

Although there have been numerous allegations of invidious discrimination against gays in the military, CJC Rule 3.6 "does not apply to [a judge's membership in] national or state military service." *CJC Rule 3.6 cmt 5.* Thus, if a judge is called to active duty in the military, he is not subject to discipline for belonging to an organization that may practice invidious discrimination.

A judge's isolated attendance at an event (a luncheon or dinner) in the facility of an organization that practices invidious discrimination does not violate this rule, provided that her attendance could not be reasonably construed as an endorsement of the organization's discriminatory practices. *CJC Rule 3.6(B).* For example, a judge could attend a friend or relative's wedding at a club that practices invidious discrimination where the wedding was arranged by someone else. The judge, however, could not hold her own wedding at such a club.

An example of inappropriate conduct was examined in the Senate confirmation hearings of United States Supreme Court Justice Anthony Kennedy. It was revealed that, while a member of the Ninth Circuit, Judge Kennedy was a member of San Francisco's Olympic Club, which excluded women from its membership rolls. Also, even though the club's policy of racial discrimination had ended 19 years earlier, it still had no African American members and had only a few Asian and Latino members.

L. PART-TIME JUDGES

Almost 70% of the approximately 3,500 judges in New York (including one of your authors) are part-time village or town justices. In New York, these justices need not be lawyers, and the vast

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majority of them are not. *Stern, Judicial Discipline in New York State: A Threat to Judicial Independence*, 7 *Pace L. Rev.* 291 (1987). The CJC applies to both nonlawyer-judges as well as lawyer-judges, because misconduct by either harms public trust and confidence in the entire judiciary. Judicial integrity must be maintained at all levels. *In re Spitalnick*, 86 N.J. 341, 347 (1981).

Part-time judges, unlike full-time judges, are permitted to practice law, act as fiduciaries, serve on boards of directors, be employees of any business, engage in otherwise prohibited political activity, and act as arbitrators. *See Application III-V*. The major restriction on a part-time judge is that such person should not practice law in the court where he or she acts as a part-time judge, or in a court from which an appeal would be taken to the part-time judge's court.

A **periodic part-time judge** is one who serves part-time, but under separate appointment for each limited period of service (year-to-year).

A **pro tempore part-time judge** is even more temporary than the periodic part-time judge. A pro tempore part-time judge serves once and needs reappointment for further judicial service.

A **continuing part-time judge** serves repeatedly on a part-time basis by election or a continuing reappointment.

Each of the above judges may practice law.

A **retired judge subject to recall** for judicial service is not permitted to practice law, but is permitted to act as an arbitrator or mediator (except while serving as a judge) and may act as a fiduciary. *See Application II*.

The CJC expressly provides that a part-time judge, unlike a full-time judge, may participate in the following activities:

1. Appointment to government positions. *CJC Rule 3.4*;
2. Reporting compensation and gifts. *CJC Rule 3.15*;
3. Engaging in transactions with lawyers or persons likely to come before the judge's court. *CJC Rule 3.11(C)(3)*;
4. Engaging in certain business activities. *CJC Rule 3.11*;
5. Managing financial interests to minimize disqualification. *CJC Rule 3.11(C)*;
6. Making judicial statements on pending or impending cases (except while acting as a judge). *CJC Rule 2.10*;
7. Acting as a fiduciary. *CJC Rule 3.8*;
8. Serving as arbitrator or mediator. *CJC Rule 3.9*;
9. Practicing law. *CJC Rule 3.10*;

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10. Engaging in political activity. *CJC Rules 4.1; 4.2; and 4.5;*
11. Receiving reimbursement of expenses and waiver of fees or charges. *CJC Rule 3.14;*
12. Forming campaign committees. *CJC Rule 4.4; or*
13. Becoming candidates for nonjudicial office. *CJC Rule 4.5.*

When a part-time judge retires or is not re-elected or reappointed (or a retired judge is no longer subject to recall), the former judge may participate in a matter as a lawyer even though she previously personally and substantially participated in the same matter as judge, but only upon the informed consent of all the parties. *See Application III, cmt. 1; MRPC Rule 1.12(a).*

CJC CANON 4

A Judge or Candidate for Judicial Office Shall Not Engage in Political or Campaign Activity that is Inconsistent with the Independence, Integrity or Impartiality of the Judiciary

Canon 4 distinguishes between candidates running for public election (who are entitled to campaign and form an election committee to solicit and accept contributions) and those who seek appointment to the bench and cannot campaign and seek or accept contributions. It also differentiates between elections that are partisan (i.e., influenced by political parties) and nonpartisan elections where political parties have no formal role in the judicial election process. *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010). In the former, a candidate for public election can nominate herself and can publicly identify with a political party by seeking, accepting, and using party endorsements; in the latter, this is prohibited. *CJC Rule 4.1(A)(7).*

A. POLITICAL ACTIVITY BY JUDICIAL CANDIDATES

The “Terminology” section of the CJC defines “judicial candidate” as “any person, including a sitting judge, who is seeking selection for or retention in [a] judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office.”

Under CJC Rule 4.1(A), a sitting judge (seeking to retain a current judicial office or seeking some other judicial office) or a candidate for election or appointment to judicial office shall not:

1. act as a leader of or hold any office in a political organization.
2. make speeches on behalf of a political organization or publicly support or oppose any candidate for political office. Judges and judicial candidates are prohibited from using the prestige of judicial office to publicly endorse or speak on behalf of a political party’s candidates or platforms. However, this restriction does not prevent judges or judicial candidates from campaigning on their own behalf or from endorsing or opposing other

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candidates for the same judicial office for which they are running. *CJC Rule 4.1 cmt. 4*. Also, in New York, voting for judicial candidates is by secret ballot in a voting booth where the curtain is drawn. However, in numerous states, candidates are selected in a primary by caucus (meetings that choose a judicial candidate). This does “not constitute public support for or endorsement of a political organization or candidate prohibited by *CJC Rule 4.1(A)(2) or (A)(3)*.” *CJC Rule 4.1 cmt. 6*.

“A judge or judicial candidate must not become involved in, or publicly associated with, a family member’s political activity or campaign for public office.” *CJC Rule 4.1 cmt. 5*. Thus, judges cannot endorse a family member running for public office.

There is no prohibition on a judge or judicial candidate expressing in private conversations his or her opinions on judicial candidates or other candidates for public office. This restriction on judicial campaign speech was struck down by the Eighth Circuit Court of Appeals as an overly broad content regulation of speech. *Wersal v. Sexton*, 613 F.3d 82 (8th Cir. 2010).

3. attend political gatherings.
4. solicit funds for, or contribute to, a political organization or candidate, including paying dues or purchasing tickets to political dinners or functions sponsored by a political organization or candidate for public office. *Wolfson v. Concannon*, 811 F.3d 1176 (9th Cir. Ariz. 2015).
5. publicly identify himself or herself as a candidate of a political organization, e.g., a judge can introduce herself as Judge Pieper, but not as Judge Pieper of a particular political party. *CJC Rule 4.1(A)(6)*. A judge or judicial candidate may, however, register to vote as a member of a political party. *CJC Rule 4.1 cmt. 3*.

The Sixth Circuit struck down this restriction on judicial candidates from disclosing party affiliation under a strict scrutiny test without a compelling state interest. *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010). See also *Winter v. Wolnitzek*, 56 F. Supp. 3d 884 (E.D. Ky. 2014) granting a preliminary injunction against a rule prohibiting a judicial candidate from campaigning as a member of a political party.

6. seek, accept, or use endorsements from a political organization.
7. use or permit the use of campaign contributions for the private benefit of the judge, a candidate seeking judicial office, or others.
8. use court facilities, staff, or other court resources in a campaign for judicial office;
9. knowingly or with a reckless disregard of the truth make a false or misleading statement. “In addition, when an independent third party has made unwarranted attacks on a candidate’s opponent, the candidate may disavow the attacks, and request the third party to cease and desist.” *CJC Rule 4.1 cmt. 8*.

Likewise, if the judicial candidate has been the object of false and misleading statements by the press or by third parties, then the candidate may make a “factually accurate public

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response.” *CJC Rule 4.1 cmt. 8*. However, “it is preferable for someone else to respond if the allegations relate to a pending case.” *CJC Rule 4.1 cmt. 9*.

10. make an extrajudicial statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.
11. in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that appear inconsistent with the impartial performance of judicial duties.
12. personally solicit or accept campaign contributions other than through a campaign committee in accordance with CJC Rule 4.4; *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656 (2015).

“Pledges, promises or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law without regard to his or her personal views.” *CJC Rule 4.1 cmt. 13*; see also *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *infra this chapter, E, Campaign Conduct, Pledges or Promises*.

Judicial candidates may, but need not, respond to the press and to surveys submitted by community organizations seeking the candidate’s views on controversial legal or political issues (e.g., gun control, abortion, or same sex marriages), as long as the candidate’s response could not be viewed as a pledge or promise. The candidate “should also give assurance that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected.” *CJC Rule 4.1 cmt. 15*.

“Candidates who do not respond [to public inquiries] may state their reason for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate’s independence or impartiality, or that it might lead to frequent disqualification.” *CJC Rule 4.1 cmt. 15*; see also *CJC Rule 2.11(A)(5)*.

Just as the Model Rules of Professional Conduct subject a lawyer to discipline for violating the Rules through the acts of another (MRPC Rule 8.4[a]), the CJC instructs judges to “take *reasonable measures* to ensure that other persons do not undertake, on behalf of the judge or judicial candidate,” any prohibited activities. *CJC Rule 4.1(B)*

As soon as someone becomes a candidate for judicial office, he or she must comply with the rules of Canon 4. *CJC Rule 4.1 cmt. 2*.

These prohibitions are constitutionally permissible because they are narrowly tailored to further a compelling state interest (preserving the impartiality and independence of the state judiciary and maintaining public confidence in the court system). However, the Code permits judicial candidates to engage in significant political activity in support of their own campaign. *Matter of Raab*, 100 N.Y.2d 305 (2003).

B. CANDIDATE IN A PUBLIC ELECTION FOR JUDICIAL OFFICE

It is estimated that “more than 89 percent of state judges must stand for election to get or retain

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office” *Bert Brandenburg and Roy A. Schotland, Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns, 21 Geo. J. Legal Ethics 1229, 1230 (2008)*. In partisan, nonpartisan, or retention public elections, unless prohibited by law, the candidate for elected judicial office may attend or purchase tickets to events sponsored by a political organization or candidate for public office, but the candidate may not spend more than a fixed maximum amount, to be set by each state adopting the Code. *CJC Rule 4.2(B) and (C)*.

Even in judicial elections, except where allowed by law, judges may not solicit funds from a political organization, make false or misleading statements during the campaign, or make promises or pledges that would compromise the integrity, impartiality, or independence of the judiciary.

“Public election” is defined in the CJC to include primary and general elections and partisan and nonpartisan elections. Judges subject to a public election may, indeed, be required to become involved in a great deal of political activity.

Except where prohibited by law, and no earlier than a time period set by each state adopting the Code, a judge or candidate subject to a public election may, before the first applicable primary, election, caucus, or general retention election:

1. purchase tickets for and attend political gatherings;
2. contribute to a political party or candidate, but each state will set a maximum dollar limit. The *CJC* permits judicial candidates to contribute to political parties “except where prohibited by law.” By law, New York prohibits such conduct to prevent the selling of judicial nominations. *Matter of Raab, 100 N.Y.2d 305 (2003)*.
3. speak to political and nonpolitical gatherings on their own behalf;
4. appear in news media advertisements;
5. distribute pamphlets and other promotional campaign material supporting his or her candidacy;
6. establish a campaign committee to solicit or accept “reasonable” campaign contributions pursuant to CJC Rules 4.4(B)(1);
7. publicly endorse or oppose judicial candidates in the same race for the same judicial office for which they are running; and
8. seek, accept, or use endorsements from any persons or organizations, other than partisan political organizations. *CJC Rule 4.2(B)*.

The Code changes drastically if a judicial candidate becomes involved in a partisan public election. Unless otherwise prohibited by law, the judicial candidate may, but not earlier than a time period set by each state, before the first applicable primary election, caucus, or general election:

1. identify themselves as a member of a political organization, such as the Democratic or Republican Party. The candidates may include the political party’s designation on her

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campaign brochure, website, literature, and even on the voting ballot. *CJC Rule 4.2(C)(1)*; 4.2 cmt. 3; and

2. seek, accept, and use endorsements of a political organization. *CJC Rule 4.2(C)(2)*.

A “candidate” for elective judicial office must resign from any office in a political organization, but does not have to resign from a “public office” such as a mayor, legislator, county prosecutor, or district attorney since such offices are not considered “an office in a political organization.”

C. CANDIDATE FOR APPOINTIVE JUDICIAL OFFICE

Where the judicial candidate is appointed to the bench instead of elected, or where a judge is seeking appointment to another government office, he or she shall not solicit or accept funds to support his or her candidacy and shall not engage in political activity to secure the appointment except that such person may communicate with the appointment authority and provide it with information as to his or her qualifications (e.g., Chief Justice Roberts going to Capitol Hill to seek support for his nomination). *CJC Rule 4.3*. The person seeking judicial appointment can seek endorsements from individuals or organizations “other than a partisan political organization.” *CJC Rule 4.3(B)*.

A non-judge who is a candidate seeking appointment to judicial office may:

1. retain office in a political organization;
2. attend political gatherings; and
3. continue to pay political dues and purchase tickets for political dinners and other functions. *CJC Rule 4.3*.

Thus, nonjudicial candidates for appointment to the bench need not cease their political activity; however, they cannot engage in political activity to secure the appointment. Additionally, they may not make extraordinary financial contributions to a political organization or to other candidates for public office. *CJC Rule 4.3*.

D. CANDIDATE FOR NONJUDICIAL OFFICE

A judge must resign from judicial office upon becoming a candidate in either a primary or general election for a nonjudicial position, except to serve as a delegate to a state constitutional convention, unless the judge is permitted by law to maintain the judicial office. *CJC Rule 4.5(A)*; see *ABA Informal Opinion 1058 (1968)*. In *Clements v. Fashing*, 457 U.S. 957 (1982), the United States Supreme Court held that the resignation requirement was a *de minimis* interference with a judge’s First Amendment interests. Additionally, since candidacy is not a 14th Amendment “fundamental” right, the state’s rational basis for the rule was sufficient. This “resign to run” rule does not apply to a judge seeking appointment (not public election) to a nonjudicial office. *CJC Rule 4.5(B)*. This “resign to run” rule is intended to ensure that the sitting judge does not make promises and pledges to the electorate on what the candidate would do if elected. It further ensures that the judge does not use her judicial office to promote her candidacy for public office.

E. CAMPAIGN CONDUCT

1. Misrepresentations

A candidate for a judicial office shall act at all times in a manner consistent with the integrity, impartiality, and independence of the judiciary. *CJC Rule 4.2(A)(1)*.

The judicial candidate shall personally review and approve the content of all campaign statements and materials generated by the candidate or her campaign committee. *CJC Rule 4.2(A)(3)*.

EXAMPLE:

Candidate Alpha is opposing Judge Baker in an election for county judge. Judge Baker has voiced approval of various practices, such as (1) requiring a physical arrest of all persons charged with a crime, even first-time offenders, and (2) threatening criminal defendants with maximum sentences if they do not plea-bargain.

HELD:

Candidate Alpha may openly disagree with these practices and state that they are unfair. Candidates in judicial elections may criticize a political opponent, including that person's fitness for judicial office. *CJC Rule 4.2(B)(3)*.

The Model Rules of Professional Conduct directly addresses statements by lawyers about judicial candidates or judges. Rule 8.2(a) prohibits statements that a lawyer knows to be false concerning the qualifications or integrity of a judicial officer or candidate.

Rule 8.2(b) applies to a lawyer who is a candidate for judicial office. "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Model Code of Judicial Conduct."

A judge or judicial candidate shall not knowingly or with reckless disregard of the truth misrepresent the identity, qualifications, or present positions of the candidate or the opponent, *i.e.* "make any false or misleading statement." *CJC Rule 4.1*.

2. Pledges or Promises

A candidate for judicial office shall not make pledges or promises regarding how she or he would decide a specific case, but may make a promise to be faithful and impartial in the performance of official duties. *CJC Rule 4.1 cmt. 13*. The "pledge, promise or commit clause" prohibits a candidate from committing to an issue or controversy "likely to come before the court." *CJC Rule 4.1A(13)*. U.S. Supreme Court Justice, Neil Gorsuch, recently did it with aplomb before the Senate Judiciary Committee by declining to answer questions on cases or issues that might come before the Court since it was unfair [and unethical] to do so.

Although a judicial candidate cannot appear to commit to a position on a particular case, candidates may express their views on disputed legal or political issues. Any attempt to ban such judicial speech is subject to strict scrutiny and may violate the First Amendment. *Republican Party*

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of *Minnesota v. White*, 536 U.S. 765 (2002). Thus, candidates for judicial office may announce their views on disputed legal and political issues, e.g., death penalty, gay marriage, and abortion. To ensure a litigant's right to an impartial judge, said the United States Supreme Court, is not to restrict a judge's campaign speech but to require judicial recusal if the judge's impartiality can be reasonably questioned. *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009). "*Caperton's* holding was limited to the rule that the judge be recused, not that . . . political speech could be banned." *Citizen's United v. FEC*, 130 S.Ct. 876, 910 (2010). Thus, a judge shall disqualify herself if she makes a public statement that commits or appear to commit her with respect to an issue, case, or controversy in a proceeding in which her impartiality might reasonably be questioned. *CJC Rule 2.11(A)(5)*.

Canon 4 does not prohibit a candidate from pledging to increase personal involvement in case resolutions or promising that the candidate will encourage greater dispute resolution between parties. One of the Canon's purposes is to prohibit candidates from making pledges or promises that appeal to prejudices or special interests. *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69 (S.D. Ohio 1984).

Also clear is the impropriety and conflict of interest for a judge who has asserted how she would decide a case. *White*, 536 U.S. at 771. Such a pledge is improper. A statement by a judicial candidate in which he promised to "work with" and "assist" police and other law enforcement personnel in "detering crime" was deemed an unethical pledge that expressed bias in favor of the police and against persons accused of a crime. *Matter of Watson*, 100 N.Y.2d 290 (2003).

EXAMPLE:

The New York Court of Appeals found no *CJC* violation where a judicial candidate asserted that she was a "law and order candidate." Statements that "merely express a view point" are different from those that "unequivocally articulate a pledge or promise of future conduct or decision-making that compromises the faithful and impartial performance of judicial duties." *Matter of Shanley*, 98 N.Y.2d 310 (2002).

EXAMPLE:

A judicial candidate wrote to local police officers urging them to "put a real prosecutor on the bench" - one who "will work with the police, not against them." The judge also wrote letters printed in the local press that their fine city was "attracting criminals from Rochester, Niagara Falls and Buffalo . . . to peddle their drugs and commit their crimes" which, as a judge, he would not tolerate.

The New York Court of Appeals censured the judge for what it determined to be a pledge or promise that compromised the candidate's ability to behave impartially or be perceived as unbiased. *Matter of Watson*, 100 N.Y.2d 290 (2003).

EXAMPLE:

While campaigning, a judge can announce his view that "I have always believed life begins at conception." However, the candidate for judicial office could not ethically pledge: "If an abortion case comes before me, I will rule in favor of the unborn

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child.” Such a statement would likely result in discipline under the “pledges and promises” clause of the CJC.

3. Fund-Raising

Fund-raising for appointment (not election) to a judicial office is prohibited. A candidate for appointment to judicial office shall not personally, or through a committee or otherwise, solicit or accept funds to support his or her appointment. Likewise, a candidate for judicial office in a contested election shall not *personally* solicit or accept campaign funds. *Williams-Yulee v. Fla. Bar*, 135 S.Ct. 1656. Here, the Court recognized the state’s vital interest in safeguarding public confidence in the fairness and integrity of the nation’s elected judges since judicial authority depends on the public’s willingness to respect and follow court decisions. However, the candidate may establish a committee to secure and manage campaign funds by letter, telephone, or any other means of communication. *CJC Rule 4.4*.

The judge’s campaign finance committee may solicit reasonable contributions no earlier than one year before an election and no later than 90 days after the last election (to pay off campaign debts). The campaign contributions shall not be used for the private benefit of the judicial candidate or others.

“Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make [reasonable] campaign contributions [to the judge’s committee and not directly to the judge], the candidate should instruct his or her campaign committee to be especially cautious in connection with such contributions, so they do not create grounds for disqualification if the candidate is elected to judicial office.” *CJC Rule 4.4 cmt. 3*.

F. APPLICATION OF CANON 4

Restrictions on political activity and campaigning apply to all incumbent judges and judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her improper campaign conduct; likewise, an unsuccessful candidate who is a lawyer is subject to ethical discipline for his or her improper campaign conduct. Under MRPC Rule 8.2, a candidate for judicial office shall comply with the CJC.

MRPC Rule 8.3 requires a lawyer to report to the appropriate authority any violation of the CJC that raises a substantial question as to a judge’s fitness for office.

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**MULTISTATE
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EXAMS**

GENERAL MPRE INSTRUCTIONS

Each question contained in the MPRE provides a factual situation along with a specific question and four possible answer choices. The examinee should choose the best answer from the four stated options. The examinee should mark only one answer for each question; multiple answers will be scored as incorrect. Since scores are based on the number of questions answered correctly, the examinee is advised to answer every question. If a question seems too difficult, the examinee is advised to go on to the next question and come back to the skipped question later. Each question may include, among others, one of the following words or phrases:

1. **“Subject to discipline”** asks whether the conduct described in the question would subject the lawyer to discipline under the provisions of the ABA Model Rules of Professional Conduct. In the case of a judge, the test question asks whether the judge would be subject to discipline under the ABA Model Code of Judicial Conduct.
2. **“May” or “proper”** asks whether the conduct referred to or described in the question is professionally appropriate in that it:
 - a. would not subject the lawyer or judge to discipline; and
 - b. is not inconsistent with the preamble, comments, or text of the ABA Model Rules of Professional Conduct or the ABA Model Code of Judicial Conduct; and
 - c. is not inconsistent with generally accepted principles of the law of lawyering.
3. **“Subject to litigation sanction”** asks whether the conduct described in the question would subject the lawyer or the lawyer’s law firm to sanction by a tribunal such as fine, fee forfeiture, disqualification, punishment for contempt, or other sanction.
4. **“Subject to disqualification”** asks whether the conduct described in the question would subject the lawyer or the lawyer’s law firm to disqualification as counsel in a civil or criminal matter.
5. **“Subject to civil liability”** asks whether the conduct described in the question would subject the lawyer or the lawyer’s law firm to civil liability, such as claims arising from malpractice, misrepresentation, or breach of fiduciary duty.
6. **“Subject to criminal liability”** asks whether the conduct described in the question would subject the lawyer to criminal liability for participation in or for aiding and abetting criminal acts, such as prosecution for insurance or tax fraud, destruction of evidence, or obstruction of justice.
7. When a question refers to discipline by the **“bar,” “state bar,”** or **“state disciplinary authority,”** it refers to the appropriate agency in the jurisdiction with authority to administer the standards for admission to practice and for maintenance of professional competence and integrity. Whenever a lawyer is identified as a **“certified specialist,”** that lawyer has been so certified by the appropriate agency in the jurisdiction in which the lawyer practices. The phrases **“informed consent”** and **“consent after consultation”** have the same meaning.

MPRE SUBJECT MATTER OUTLINE

I. Regulation of the legal profession (6–12%)

- A. Powers of courts and other bodies to regulate lawyers
- B. Admission to the profession
- C. Regulation after admission—lawyer discipline
- D. Mandatory and permissive reporting of professional misconduct
- E. Unauthorized practice of law—by lawyers and nonlawyers
- F. Multijurisdictional practice
- G. Fee division with a nonlawyer
- H. Law firm and other forms of practice
- I. Responsibilities of partners, managers, supervisory and subordinate lawyers
- J. Restrictions on right to practice

II. The client-lawyer relationship (10–16%)

- A. Formation of client-lawyer relationship
- B. Scope, objective, and means of the representation
- C. Decision-making authority—actual and apparent
- D. Counsel and assistance within the bounds of the law
- E. Termination of the client-lawyer relationship
- F. Client-lawyer contracts
- G. Communications with the client
- H. Fees

III. Client Confidentiality (6–12%)

- A. Attorney-client privilege
- B. Work product doctrine
- C. Professional obligation of confidentiality - general rule
- D. Disclosures expressly or impliedly authorized by client
- E. Other exceptions to the confidentiality rule

IV. Conflicts of interest (12–18%)

- A. Current client conflicts—multiple clients and joint representation
- B. Current client conflicts—lawyer's personal interest or duties
- C. Former client conflicts
- D. Prospective client conflicts
- E. Imputed conflicts
- F. Acquiring an interest in litigation
- G. Business transactions with clients
- H. Third party compensation and influence
- I. Lawyers currently or formerly in government service
- J. Former judge, arbitrator, mediator, or other third-party neutral

V. Competence, legal malpractice, and other civil liability (6–12%)

- A. Maintaining competence
- B. Competence necessary to undertake representation
- C. Exercising diligence and care
- D. Civil liability to client, including malpractice
- E. Civil liability to nonclients
- F. Limiting liability for malpractice
- G. Malpractice insurance and risk prevention

MPRE SUBJECT MATTER OUTLINE

VI. Litigation and other forms of advocacy (10–16%)

- A. Meritorious claims and contentions
- B. Expediting litigation
- C. Candor to the tribunal
- D. Fairness to opposing party and counsel
- E. Impartiality and decorum of the tribunal
- F. Trial publicity
- G. Lawyer as witness

VII. Transactions and communications with persons other than clients (2–8%)

- A. Truthfulness in statements to others
- B. Communications with represented persons
- C. Communications with unrepresented persons
- D. Respect for rights of third persons

VIII. Different roles of the lawyer (4–10%)

- A. Lawyer as advisor
- B. Lawyer as evaluator
- C. Lawyer as negotiator
- D. Lawyer as arbitrator, mediator, or other third-party neutral
- E. Prosecutors and other government lawyers
- F. Lawyer appearing in nonadjudicative proceeding
- G. Lawyer representing an entity or other organization

IX. Safekeeping funds and other property (2–8%)

- A. Establishing and maintaining client trust accounts
- B. Safekeeping funds and other property of clients

- C. Safekeeping funds and other property of third persons
- D. Disputed claims

X. Communications about legal services (4–10%)

- A. Advertising and other public communications about legal services
- B. Solicitation—direct contact with prospective clients
- C. Group legal services
- D. Referrals
- E. Communications regarding fields of practice and specialization

XI. Lawyers' duties to the public and the legal system (2–4%)

- A. Voluntary pro bono service
- B. Accepting appointments
- C. Serving in legal services organizations
- D. Law reform activities affecting client interests
- E. Criticism of judges and adjudicating officials
- F. Political contributions to obtain engagements or appointments
- G. Improper influence on government officials
- H. Assisting judicial misconduct

XII. Judicial conduct (2–8%)

- A. Maintaining the independence and impartiality of the judiciary
- B. Performing the duties of judicial office impartially, competently, and diligently
- C. Ex parte communications
- D. Disqualification
- E. Extrajudicial activities

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**MULTISTATE
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EXAM I**

You have two hours and five minutes to complete the following sixty simulated MPRE questions.

EXAM INSTRUCTIONS

The following practice exam consists of sixty (60) multiple choice questions for which you have two hours and five minutes to complete. Though some questions may take you longer than others, the exam allots you an average of two and a half minutes per question. Manage your time carefully. If you spend too much time on one or more challenging questions, you may have difficulty completing the exam.

A brief factual scenario precedes each question. Read each scenario and the words of the question carefully. Then, evaluate the four answer choices provided. You should select the *best* answer from the choices provided.

All of your selected answers should be based on your knowledge of the disciplinary rules of professional conduct currently articulated in the American Bar Association (ABA) Model Rules of Professional Conduct, the ABA Model Code of Judicial Conduct, controlling constitutional decisions, generally accepted principles established in leading federal and state cases, and in procedural and evidentiary rules. To the extent that questions of professional responsibility arise in the context of procedural or evidentiary issues, such as the availability of litigation sanctions or the scope of the attorney-client evidentiary privilege, the Federal Rules of Civil Procedure and the Federal Rules of Evidence will be assumed to apply, unless otherwise stated. This exam is not meant to test your personal ethical beliefs and values.

Record each of your answers on one of the answer sheets provided on the page following this exam. You will receive no credit for any answers or other markings made in the exam booklet. You will only receive credit for correct answers marked on your answer sheet. You will not be given any additional time to transcribe any of your answers from the exam booklet to your answer sheet.

If you do not know the answer to a question, you should choose an answer at random (guess) and record that answer on your answer sheet. Your score is based on your total number of correct answers, and there is no penalty for incorrect answers. Guessing when you do not know an answer will not hurt your score and may actually improve it, so record an answer for each of the sixty questions.

You may only select one answer choice on your answer sheet. If two answer choices are marked you will receive no credit, even if one of your choices was the correct answer.

Question 1.

An attorney was retained to represent a client in an effort to recover damages arising out of an automobile collision in which the client sustained minor property damage and only slight bodily injury. The other party to the collision was a utility corporation that the client intensely disliked because of several utility bill disputes he'd had with the corporation over a period of years. Because of this history, the client told the attorney, "I hate that outfit. I will not settle this case for any amount of money. I want you to take this case to court, embarrass them, and wring every penny out of them that you can." The attorney promptly filed suit against the utility corporation.

During discovery, the attorney learned there was a substantial likelihood that the client had been contributorily negligent in causing the accident.

At trial, the attorney contended that the court should adopt a comparative negligence standard, rather than the contributory negligence standard that courts in the jurisdiction had followed for years. The attorney knew that under the contributory negligence theory the client faced a substantial risk of recovering nothing.

Is the attorney subject to discipline for putting forth his comparative negligence argument?

- (A) Yes, because contributory negligence, as a total bar to recovery, is well established in the law of that state.
- (B) Yes, because adoption of comparative negligence is solely a legislative matter.
- (C) No, if a good faith argument can be made in support of the attorney's contention.
- (D) No, because his contention was in the client's best interest.

Question 2.

A client was injured when he fell down stairs at a restaurant. The client met with several lawyers in the area about bringing a personal injury action against the owner of the restaurant, but none had been interested in taking the case because the client did not have the money to pay the attorney's fees.

An attorney then agreed to represent the client and to take the case on a contingency basis. The contingency fee was consistent with the contingency fees that the attorney charged his other clients, and was consistent with fees charged by other attorneys in the jurisdiction. The attorney also agreed to advance the costs of investigating the client's claim, pay the client's hospital bills arising out of the injury and advance him money to help him get back on his feet until the litigation can be resolved, and finally to arrange for an extensive medical examination in preparation for trial and guarantee that if the client does not pay the costs, the attorney will pay.

Was the attorney's conduct proper?

- (A) Yes, because in zealously representing a client, an attorney may advance funds for any purpose.
- (B) Yes, because the client is indigent.
- (C) No, because the attorney may not pay medical expenses incurred by the client.
- (D) No, because an attorney may not advance funds to a client.

Question 3.

An attorney was a member of the bar of State X and a licensed stockbroker in State Y. Depending on the markets and the time of year, the attorney split his time between the two professions. As a rule, the attorney never performed both legal and brokering services to the same clients.

Last month, the attorney's stockbroker license came up for renewal. A line item on the renewal application asked whether the attorney earned income from another profession within or without State Y. Not wanting to "raise any flags" about his dedication to his brokerage clients, the attorney answered the line item "no."

Is the attorney subject to discipline in State X?

- (A) Yes, because he lied on the application.
- (B) Yes, but only if he is first charged with and convicted of a criminal offense in State Y.
- (C) No, because he did not file the application in his capacity as an attorney.
- (D) No, because the application was not filed in State X.

Question 4.

An attorney was the majority shareholder of an incorporated collection agency. The attorney authorized the agency's manager, who is not a member of the bar, to write collection letters to agency debtors on the attorney's law firm's letterhead, and to sign them in the attorney's name. These letters contain a statement that the matter has been referred to the attorney and that a lawsuit will be filed if payment is not received within thirty days. Per the attorney's instruction, the manager only sends out letters in circumstances where the manager in good faith believes a collection dispute exists. If any debtors call seeking legal advice, the manager passes along the calls to the attorney.

Is the attorney subject to discipline?

- (A) Yes, because the letter uses the threat of litigation as a form of extortion.
- (B) Yes, because the attorney is assisting the agency in engaging in the unauthorized practice of law.
- (C) No, because the threat of a legitimate lawsuit is not improper.
- (D) No, because the manager is acting in good faith as the attorney's authorized agent.

Question 5.

An attorney recently passed the bar examination and was admitted to practice law in State Z. As has always been her dream, she went out on her own and began building a general law practice.

To increase the volume of her business, the attorney inserted a full page advertisement in her local telephone book. In the ad, she truthfully mentioned that she was fluent in Spanish and that clients could pay her fees by credit card. She also listed, with their permission, the names of some of her present clients. Her hope in including these items was that she would attract lower income clients from her predominantly Spanish-speaking neighborhood, who might be suspicious of lawyers.

Soon after she placed the advertisement, she noticed that her office received an increase in calls from potential clients looking for her legal services. Some of the new clients referenced the advertisement as the reason they felt comfortable seeking out and retaining her services.

Is the attorney's advertisement proper?

- (A) No, because she claims that she is fluent in Spanish.
- (B) No, because a lawyer cannot accept legal fees paid by credit card.
- (C) No, because the use of client names, irrespective of whether the clients give their permission, is a violation of client confidence.
- (D) Yes, the advertisement is proper.

Question 6.

A husband and wife retained an attorney to prepare their mutual wills. The attorney had represented them before on several real estate matters. Both wills were to leave all of the first deceased spouse's property to the surviving spouse for life, and then, upon the death of the survivor, one-half of the property to the husband's son by a prior marriage, and one-half to the wife's daughter by a prior marriage. The attorney drafted the wills per the couple's instructions and oversaw the proper execution of the instruments.

Six months after the wills were executed, the wife asked the attorney to prepare a new will for her that would leave all of her property to her daughter. When the attorney asked the wife if the husband had decided to change his will as well, the wife said "no" and that she did not want the husband to know of any change.

Is it proper for the attorney to prepare and execute the wife's new will?

- (A) Yes, and he may not inform the husband of the new will.
- (B) Yes, if he informs the husband about the new will.
- (C) No, and he must inform the husband of the wife's intention to change her will.
- (D) No, and he may not inform the husband of the wife's intention to change her will.

Question 7.

A client inherited Whiteacre, a parcel of land worth \$100,000. The client then retained an attorney to bring an action to quiet title against a third party.

The attorney quoted the client a fee of \$10,000, which was his usual fee for such actions. The client agreed to the price and, as security for payment of the fee, conveyed in writing to the attorney a mortgage on Greenacre, another parcel owned by the client. The attorney duly recorded the mortgage in Greenacre's chain of title.

Is the attorney subject to discipline?

- (A) No, if the attorney advised the client to seek independent counsel regarding the conveyance.
- (B) No, because fee arrangements between lawyers and clients are not subject to review by the bar.
- (C) Yes, because a lawyer may not acquire an interest in a client's property.
- (D) Yes, because attorneys' liens on client property to secure legal fees are forbidden as a matter of public policy.

Question 8.

An attorney became a member of the bar in State X in 2004. He practiced for several years, but no longer practices law and instead operates a licensed investment counseling business.

Last week, an investor consulted the attorney about investment opportunities. The attorney persuaded the investor to put \$10,000 into a private equity fund that purchases companies that the fund's management deems undervalued. The investor never inquired about ownership of the fund, nor did the attorney disclose that the attorney owned 95% of the fund.

Is the attorney subject to discipline?

- (A) Yes, because attorneys are prohibited from soliciting investments from clients.
- (B) Yes, because the attorney's failure to disclose his interest is misleading.
- (C) No, because the investor did not consult the attorney in his capacity as an attorney.
- (D) No, because the attorney no longer practices law and therefore is not bound by the Rules of Professional Responsibility.

Question 9.

A judge served on the superior court of State X for twenty years before he retired. Upon retiring from the bench, the judge traveled extensively around the United States visiting relatives and old friends. When he returned from his travels, he joined a law firm.

The firm had frequently appeared in matters in the superior court before the judge, including a still pending, high-profile matter in which the law firm represented the plaintiff. The judge had made several major rulings in the case.

After full disclosure was made to both parties, the parties gave informed consent, in writing, to allow the firm to continue its representation in the case. The parties further agreed to permit the judge to represent the plaintiff.

A new judge was assigned to the case.

Is it proper for the firm to continue to represent the plaintiff?

- (A) Yes, but only if the new judge approves a screening procedure.
- (B) Yes, because both parties gave informed consent confirmed in writing.
- (C) No, because the judge personally and substantially participated in the matter.
- (D) No, even if the judge believes he can assist in expediting a settlement in this protracted litigation.

Question 10.

An attorney represented the plaintiff in a personal injury action.

After several weeks of negotiation, the parties reached a settlement. The defendant agreed to pay \$25,000 to the plaintiff in full settlement of any claims arising out of the accident that the plaintiff may have had against the defendant.

The attorney received the settlement check, made payable to the attorney, in the sum of \$25,000.

What is the proper course of action for the attorney to take?

- I Endorse the check and send it to the plaintiff.
 - II Deposit the check in the attorney's personal bank account and send a personal check for \$25,000 to the plaintiff.
 - III Deposit the check in the attorney's Clients' Trust Fund Account, advise the plaintiff, and forward a check drawn on that account to the plaintiff, minus the fee to which the attorney is entitled.
- (A) I only.
 - (B) III only.
 - (C) Both I and III, but not II.
 - (D) I, II and III.

Question 11.

An attorney is widely regarded as one of the top practitioners in the field in family law. About ninety percent of her clients are women involved in divorce actions and matters relating thereto. The other ten percent of her clients retain her for small, general litigation matters.

The attorney serves as a member of the Bar Association and as an officer of the Bar Association's Family Law Committee. The President of the Bar Association has asked her to draft recommended legislative changes to the State's Equitable Distribution Law to be submitted to the Legislature. The proposed legislative changes statistically would benefit females more than males.

Is it proper for the attorney to draft the changes?

- (A) Yes, if she discloses to the Bar Association that the legislative changes may favor her clients.
- (B) Yes, if she discloses to the Bar Association that the legislative changes may favor her clients, and she must identify these clients.
- (C) No, because she has a conflict of interest in drafting the legislation.
- (D) No, if any of the recommended reforms would be adverse to any of the attorney's clients.

Question 12.

An attorney represented the defendant in bitter and protracted litigation. At the defendant's request, the attorney made several offers of settlement to the plaintiff's lawyer, all of which were rejected.

During a weekend recess in the trial, the defendant's attorney and the plaintiff attended the same fundraiser. The plaintiff, who recognized the defendant's attorney from across the courtroom, made her way over to the defendant's attorney and said, "Why can't we settle this case for \$50,000? The trial is costing both sides more than it's worth." The defendant's attorney responded, "I agree, and I've hoped that you would reach that conclusion." The defendant's attorney and the plaintiff then worked out a fair and reasonable settlement for \$50,000.

Was the attorney's conduct at the fundraiser proper?

- (A) Yes, because the plaintiff initiated the conversation.
- (B) Yes, because the law encourages parties to settle their differences out of court.
- (C) No, because the defendant's attorney knew the plaintiff was represented by counsel.
- (D) No, because the defendant's attorney engaged in an ex parte communication with the plaintiff.

Question 13.

After a long and distinguished career as a partner and senior litigator, an attorney announced he was retiring from a products liability defense law firm. Sad to see him leave, the firm asked the attorney if he was willing to make himself available to the firm in an “of counsel” relationship for frequent consultation on important litigation matters. The firm offered to pay the attorney a handsome hourly rate for his services and to keep the attorney’s name on the firm name and letterhead.

Flattered and happy to earn some money in retirement, the attorney agreed to the arrangement.

Is it proper for the attorney to accept this arrangement?

- (A) No, because the firm cannot share profits with a nonlawyer.
- (B) No, because a lawyer whose name appears in the firm name cannot be designated “of counsel.”
- (C) Yes, if the relationship remains close and regular.
- (D) Yes, but only if the firm removes the attorney’s name from the firm name.

Question 14.

An attorney was employed by an insurance company, as part of its in-house legal staff, solely to handle fire insurance claims. While so employed, she participated in the review of a fire loss claim brought by a claimant. The insurance company ultimately denied the fire loss claim, and the claimant sued the insurance company.

The attorney soon after left the employ of the insurance company and started working in a law firm.

The claimant, unhappy with his lawyer in the fire claim litigation, asked the attorney to represent him or to refer him to another lawyer for legal representation in the suit on the claim.

Which of the following is proper?

- (A) The attorney may discuss the matter with the claimant and give advice as to how to proceed, but may not formally represent the claimant.
- (B) The attorney may represent the claimant.
- (C) The attorney may refer the claimant to an associate in her law firm, provided the attorney does not share in any fee.
- (D) The attorney must refuse the matter, but may give the claimant a list of lawyers known to Alpha to be specialists in handling such claims.

Question 15.

A client approached an attorney seeking assistance in a slip and fall incident in which the client had injured himself while shopping at Wallmart. The attorney, prior to going into private practice three years ago, was employed in Wallmart's general counsel's office, where she negotiated and drafted all of Wallmart's commercial leases.

The client asked the attorney to represent him or to refer him to another lawyer for suit on the slip and fall claim against Wallmart. The attorney did not possess any confidential information of Wallmart's that would assist her current client or be damaging to Wallmart in the slip and fall case.

Which of the following is correct?

- (A) The attorney must refuse to discuss the matter with the client.
- (B) The attorney may represent the client, but must obtain Wallmart's informed consent.
- (C) The attorney must consult with the client, learn the facts, and assist the client until the client finds another lawyer to take over the matter.
- (D) The attorney may represent the client or refer the client to lawyers the attorney knows to be specialists in handling slip and fall cases.

Question 16.

An attorney represented the plaintiff in an action against the operator of a golf course after the plaintiff was seriously injured on the course. The golf course offered to settle the case for an amount the attorney considered to be unacceptably low. Fearful that the plaintiff, who was in desperate need of cash, might accept the low offer, and genuinely believing that she was acting in the plaintiff's best interest, the attorney rejected the offer without communicating it to the plaintiff.

The case later went to trial and the plaintiff received a monetary award considerably larger than the offered settlement amount the attorney had rejected. The plaintiff was thrilled with the result.

Is the attorney subject to discipline?

- (A) No, because while the client dictates the objectives of the case, the attorney is responsible for the tactical and procedural decisions.
- (B) No, because a substantially larger offer or judgment was recovered by the plaintiff.
- (C) Yes, because the attorney was required to communicate the offer to the plaintiff.
- (D) Yes, if the plaintiff and the attorney had agreed to a contingent fee.

Question 17.

After much negotiation and with the aid of a broker, the owner of a business entered an agreement to sell her business to a buyer. The details having been agreed upon, the owner and buyer consulted an attorney to prepare the closing documents and act as escrow holder. The owner and the buyer agreed that each would pay one-half of the attorney's fees. They also explained to the attorney that the parties were in complete agreement about the negotiated terms of the sale.

Is it proper for the attorney to accept this employment and fee arrangement?

- (A) Yes, because the attorney's activities do not constitute the practice of law.
- (B) Yes, if the attorney can fully protect the interests of both owner and the buyer, and the parties continue to be in agreement.
- (C) No, because the attorney is representing both sides of a business transaction.
- (D) No, because the attorney is aiding an unlicensed person, the broker, in the unauthorized practice of law.

Question 18.

A husband consulted an attorney after his wife began a proceeding to dissolve their marriage and determine their property rights. The husband informed the attorney that he did not intend to contest the dissolution proceeding; the only issue the husband wanted to contest was whether \$500,000 of assets held in the husband's name were separate property or marital property.

The attorney offered to represent the husband for a retainer of \$25,000 plus 33% of the value of any assets judicially determined to be the husband's separate property. The husband, finding the fee arrangement to be more reasonable than the fees he had been quoted by other lawyers, agreed in writing to the fee arrangement.

Is the attorney's conduct proper?

- (A) No, because contingent fee arrangements in cases involving marital property rights are improper.
- (B) No, but only if the court later finds the amount of the fee to be unreasonable.
- (C) Yes, if the fee arrangement was in writing and reasonable when entered.
- (D) Yes, because fee arrangements between lawyers and clients are not subject to review by the bar.

Question 19.

A buyer and a seller were about to close on a transaction, arranged by a broker, for the purchase and sale of a business. The parties agreed that the buyer would put down a 20% deposit prior to closing.

To keep the transaction moving toward closing (when the broker would earn his commission on the sale), the broker suggested that his own attorney serve as escrow holder for both the buyer and the seller. The broker told both parties that the attorney's services as escrowee would cost less than a bank or escrow company's services. Without speaking to the attorney and solely on the broker's recommendation, the buyer and seller agreed to the cost-saving suggestion, and placed the funds with the attorney.

Unbeknownst to the buyer and seller, the broker and the attorney had an arrangement whereby the broker would offer his clients the attorney's escrow services at the conclusion of each of the broker's deals. Both the broker and the attorney were aware that the attorney charged more than a bank or escrow company, but the two split the overcharge as consideration for the broker's referral.

Is the attorney subject to discipline?

- (A) Yes, because the attorney knowingly was a party to a dishonest practice.
- (B) Yes, because the attorney had a conflict of interest in acting as escrow holder for both the buyer and seller.
- (C) No, because the attorney was acting merely as an escrow holder, not as a lawyer.
- (D) No, because the attorney did not make any misrepresentation to the buyer or seller.

Question 20.

Able consulted an attorney for advice about bringing an adverse possession action to quiet title to Blackacre. Able disclosed all of the facts of and potential problems with his claim, but did not disclose the name of the holder of record title. The attorney informed Able that she would consider the matter and then advise Able.

By searching the land records, the attorney learned that Baker, a long-standing client of the attorney, was the holder of record title to Blackacre. The attorney immediately advised Able that she would not represent him. Able then retained another lawyer to sue Baker to quiet title.

Is it proper for the attorney to defend Baker in the quiet title litigation brought by Able?

- (A) Yes, because the attorney owes Baker her undivided loyalty.
- (B) Yes, because the attorney did not agree to represent Able.
- (C) No, because Able consulted with the attorney on the matter, and the attorney thereby received information that could be significantly harmful to Able.
- (D) No, because the attorney ascertained the name of the holder of title as a result of Able's visit to her office.

Question 21.

Attorneys Alpha and Beta are partners in the law firm of Alpha, Beta and Cigma. The two attorneys do not share the same political views, but this in no way interferes with their relationship. Indeed, they are great friends and work well as a team.

A long-standing, valuable client of the partnership consulted Alpha about bringing a claim against a defendant. The defendant was a political candidate that Beta strongly endorsed and hoped to see elected to office in the next election. Neither Alpha nor Beta has ever represented or given legal advice to the defendant, but Beta had made monetary contributions to the defendant's campaigns over the years. Alpha accepted the representation.

Was Alpha's conduct proper?

- (A) Yes, but only if Beta's personal interest does not interfere with Alpha's representation of the client and the client gives consent after full disclosure.
- (B) Yes, because the client was a long-standing firm client and the defendant has never been a firm client, there is no conflict.
- (C) No, because Beta's campaign contributions disqualify Beta and her firm from representing a client adverse to the defendant.
- (D) No, because Alpha will not be able to adequately represent the client without Beta's assistance.

Questions 22.

An attorney represented the defendant in a breach of contract case tried before a jury. The jury returned a verdict for the plaintiff.

Disappointed, the attorney planned to move for a new trial on the grounds of lack of sufficient evidence and misconduct of the jury. The attorney believed that one of plaintiff's fact witnesses testified falsely at the trial. The attorney also believed that one of the jurors who voted in favor of the plaintiff concealed her prejudice against the defendant when examined on voir dire.

The attorney ascertained the home address of both the witness and juror, and contacted them both in preparation for the appeal. The witness and juror willingly discussed the matter with the attorney, and the attorney used the fruits of those discussions in support of the defendant's appeal.

Was the attorney's conduct proper?

- (A) Yes, an attorney may interview adverse fact witnesses or jurors in preparation for an appeal.
- (B) Yes, if the attorney first obtained the consent of the plaintiff's counsel.
- (C) No, because attorneys are prohibited from contacting a juror after an adverse verdict.
- (D) No, unless authorized by local court rules.

Question 23.

An attorney worked as a prosecutor in State X for ten years before he decided to leave the prosecutor's office. Having tried countless criminal cases, the attorney decided to focus solely on only civil matters while in private practice. One day, a judge saw the attorney in the State X courthouse and asked the attorney to take on, as a pro bono matter, the defense of an indigent criminal defendant who had no prior criminal record. Not wanting to disappoint the judge, the attorney agreed to check his litigation schedule.

After checking his schedule and determining that he could fit the indigent's case into his calendar, the attorney learned from a court clerk that the indigent defendant was charged with killing a police officer. The case was widely reported in the press, and public sentiment was against the defendant and everyone associated with her. The attorney was concerned that his business would suffer if he represented such a reprehensible defendant.

Is it proper for the attorney to decline this pro bono appointment?

- (A) Yes, if the attorney's practice would suffer from the negative publicity.
- (B) Yes, because the attorney previously served as a prosecutor in the jurisdiction.
- (C) Yes, if the attorney believed that the defendant was guilty.
- (D) No, the attorney should accept this appointment.

Question 24.

Alpha, an attorney who leased office space, sued his landlord for various breaches of his lease. Because landlord-tenant work is not Alpha's forte, he retained another lawyer to represent him in the suit.

With his legal fees rapidly mounting, Alpha wished to personally contact his landlord, who was also represented by counsel, to discuss a possible settlement. Previous efforts to settle between Alpha's lawyer and the landlord's lawyer had been unsuccessful, but Alpha was convinced that if the two parties spoke face-to-face, a reasonable compromise could be reached.

Is it proper for Alpha to contact his landlord directly?

- (A) Yes, because the First Amendment protects all attorney speech.
- (B) Yes, even without informing the landlord's lawyer, but he should avoid overreaching.
- (C) No, because a lawyer is prohibited from communicating directly with another party whom the lawyer knows is represented by counsel.
- (D) No, because such communication with a nonlawyer will give rise to the appearance of impropriety.

Question 25.

A buyer and a seller, both represented by counsel, were locked in a fierce trial over the value of the business the seller sold to the buyer for \$3 million two years earlier. The parties, once friendly, had developed a bitter hatred toward one another such that they no longer spoke.

While outside the courthouse during a lunch recess, the buyer stopped the seller's attorney, and told her that he would settle the matter with the seller if the seller paid \$25,000 and said he was "sorry." The seller's attorney told the buyer that she could not discuss the matter any further with the buyer, and the two parted ways.

Once in her car, the seller's attorney called the seller and informed him of her brief encounter with the buyer. The seller, thrilled at the offer, instructed his attorney to speak to the buyer's lawyer and agree to the buyer's terms.

The seller's attorney turned her car around, found the buyer's lawyer in the courthouse, and told the buyer's lawyer all that had transpired during lunch.

Was the seller's attorney's conduct proper?

- (A) Yes, because it is the duty of an attorney to seek to avoid litigation.
- (B) Yes, because the seller's attorney's brief conversation with the buyer was not a violation of the rules of ethics.
- (C) No, because the seller's attorney's information came directly from an adverse party represented by counsel.
- (D) No, because only the attorney of record for the buyer has authority to make a settlement offer.

Question 26.

An attorney's best client requested that the attorney submit an affirmation recommending the client's son for admission to the bar. The attorney did not know the client's son, but has known the client for more than 20 years and has found her to be a trustworthy citizen and an exemplary parent.

The attorney, a parent herself, agreed to attest to the client's son's character and submit the affidavit, but only after she had discussed the son with her client for about an hour. After those discussions, the attorney felt that she had learned enough about the son to truthfully vouch for his character. The attorney even invited the son to a party the following month to meet her daughter. The attorney then drafted, signed, and submitted the affirmation to the state bar character committee.

Was the attorney's conduct proper?

- (A) Yes, if the affirmation did not contain any misstatements of fact.
- (B) Yes, if the attorney truly believed the facts to which she attested.
- (C) No, because the attorney did not have a valid basis for personally attesting to the son's character.
- (D) No, because the discussions with the client were not conducted under oath.

Question 27.

The Charlotte River Cats and the Durham Bull Dogs enjoy a spirited minor league baseball rivalry. Attorney Alpha represents a professional baseball player with the Bull Dogs, who many anticipate will have a long and prosperous career. Attorney Beta represents the River Cats, who desperately need a top flight center fielder. After months of negotiations between Alpha and Beta, the parties finally reached an agreement. While satisfied overall, the player was somewhat disappointed with the salary he received. He had hoped to command \$4.4 million per year, but was required to settle for a yearly salary of just under \$4 million.

Beta agreed to draw up the employment contract. When she finished, she sent the final contract to Alpha for execution by the player. Upon reviewing the contract, Alpha noticed that the salary set forth therein incorrectly granted the player the \$4.4 million yearly salary the ballplayer had sought early on in the negotiations, not the figure to which the parties ultimately agreed.

Is it proper for Alpha to obtain the player's signature on the contract and return it to Beta without calling the error to Beta's attention?

- (A) Yes, because an attorney cannot disclose the confidences or secrets of a client.
- (B) Yes, but only if the player is fully advised and consents to the nondisclosure.
- (C) No, if Beta specifically questions Alpha about the salary.
- (D) No, because such conduct is deceitful.

Question 28.

A woman and her neighbor had been friends for over 15 years, until she came home to find the neighbor in bed with her husband. Distraught and betrayed, the woman suffered a nervous breakdown and slipped into a deep depression. After several months of constant medical observation and therapy, the woman decided that she was ready to reconcile with her husband. She was not, however, prepared to forgive her neighbor.

Last week, the woman saw the neighbor walking her dog on the woman's property. Before the woman could command the neighbor to leave, the dog ate two of the woman's flower bushes. The woman called an attorney considered to be the toughest lawyer in town. During the initial consultation, the woman explained to the attorney that the attorney had come highly recommended and that the woman trusted his discretion on how to handle every aspect of the matter. However, the woman stated that, even though she had not suffered significant money damages, she wanted to sue her neighbor for trespass to get back at her for her adulterous ways. To that end, the woman instructed the attorney to aggressively litigate the matter and not to settle, "no matter what."

Is the attorney subject to discipline if the attorney files this lawsuit?

- (A) Yes, if the attorney believes that the woman's position ultimately will not prevail.
- (B) No, because one of the woman's significant motives is to harass the neighbor.
- (C) Yes, because every case involving trespass is meritorious.
- (D) No, if the attorney can make a good faith argument in support of the woman's claim.

Question 29.

An attorney was retained by a client to represent the client in a wrongful termination lawsuit. The client had a physical disability and had been confined to a wheelchair for the past 10 years. During their preparation for trial, the client told the attorney that, while the client felt that his former employer had fired him because of his age, he knew that the firing had nothing to do with his disability.

At trial, the client testified on direct examination about the circumstances of his employment and eventual termination. On cross-examination, flustered by the damaging questions asked by the defendant's counsel, the client suddenly stated that he was terminated in part because of his disability.

What is the proper action for the attorney to take?

- (A) Withdraw immediately as counsel in the case and say nothing to anyone about the matter.
- (B) Immediately object to the testimony and advise the tribunal of the misrepresentations.
- (C) Proceed to final judgment and say nothing to anyone about the matter.
- (D) Attempt at the first opportunity to convince the client that he should set the record straight, and, if necessary, disclose the perjury to the tribunal.

Question 30.

An attorney represented a client in a contract dispute involving royalties that the client believed she was owed by a music studio. Because the dispute centered on work that the client considered intimately personal, she valued it highly, and consistently refused to settle the matter.

After a jury trial, the client was awarded \$1,000 in damages, a sum that she considered to be an insult to her talent. The client, acting out of spite and knowing that there was no basis for doing so, demanded that the attorney file a motion for a new trial based on jury prejudice. The attorney did not believe that a good faith argument could be made to support the client's frivolous position, but the client insisted.

Is the attorney subject to discipline?

- (A) Yes, if the attorney fails to follow the client's instructions.
- (B) No, if the attorney withdraws immediately from the representation.
- (C) No, if the attorney ignores the client's demand and simply accepts payment of the judgment on her behalf.
- (D) No, if the attorney withdraws from the case after taking reasonable steps to avoid prejudice to the client's rights.

Question 31.

A wife retained an attorney to represent her in separating from her husband. The attorney wrote a letter to the husband to inform him that the attorney had been retained by the wife and to advise the husband to obtain legal counsel. The husband called the attorney and advised him that he intended to represent himself, but the husband then suggested that the attorney represent both the husband and wife in the separation. The attorney advised the husband that this was not possible and the attorney made it clear that he would represent only the wife's interests in the matter.

After meeting with the wife again, the attorney drafted a separation agreement and sent it to the husband to review. The husband, without the assistance of counsel, signed the agreement.

Is the attorney subject to discipline?

- (A) Yes, because the husband was an unrepresented party.
- (B) Yes, because even indigent clients are entitled to legal representation in all judicial proceedings.
- (C) No, because preparing the document for an unrepresented party to sign is not the impermissible giving of legal advice.
- (D) No, as long as all the communications were in writing.

Question 32.

Pursuant to a written retainer agreement, an attorney represented several claimants against a defendant for injuries resulting from a multi-vehicle accident. The attorney never discussed with the clients what settlement terms would be acceptable to them. A lawyer representing the defendant's insurance company has offered to settle all the claims for a lump sum of \$100,000, leaving it to the attorney to distribute the money among his clients as he thinks just and proper under the circumstances.

Is it proper for the attorney to accept the offer of settlement on behalf of the plaintiffs?

- (A) Yes, if, in the retainer agreement, the attorney obtained from each client authorization to settle without further consultation.
- (B) Yes, if the total sum is reasonable and the attorney divides it equally among his clients.
- (C) Yes, if all clients are fully informed of each claim, the offered settlement, and the attorney's proposed distribution to each client, and all agree in a signed writing.
- (D) No, because a lawyer cannot accept a lump sum settlement on behalf of multiple defendants.

Question 33.

An attorney representing the plaintiff in an automobile collision suit was aware that the defendant had a defense based on the conduct of a person not named as a party to the lawsuit. The attorney realized that the lawyer representing the defendant was unaware of the defense, due to the lawyer's failure to investigate the circumstances of the accident.

The attorney knew the defendant's lawyer from law school and felt guilty about taking advantage of the oversight. Therefore, the attorney called the defendant's lawyer and left an anonymous message informing him of the defense. The next day, the defendant's lawyer raised the defense.

Was the attorney's conduct proper?

- (A) Yes, because the attorney is obligated to act in furtherance of justice.
- (B) Yes, and the attorney need not obtain permission from the plaintiff to inform defendant's lawyer of the defense.
- (C) No, because the attorney's disclosure should have been made to the court so as to avoid being charged with presenting a false claim.
- (D) No, because the attorney should have continued to zealously represent the plaintiff without disclosing the possible defense.

Question 34.

A third-year law student worked as a clerk for an attorney. The clerk performed paralegal-type work and legal research for the attorney, but did not appear in court.

The clerk informed the attorney that his friend had a legal problem, and that the clerk had been assisting him in the matter. The matter involved an existing order of protection issued to the friend's former fiancé because of the friend's alleged domestic abuse. The clerk had provided his friend extensive legal advice on the matter and assisted him in preparing motion papers, but the matter had reached a stage in which the clerk needed the attorney's input.

The attorney agreed to give the clerk some advice, but stated that the attorney did not have time to personally represent the friend. Accordingly, the attorney gave the clerk a sample brief and some legal forms.

Ultimately, the clerk was successful in vacating the order against his friend.

Is the attorney subject to discipline?

- (A) Yes, because the attorney neglected the friend's legal matter.
- (B) Yes, because the attorney assisted in the unauthorized practice of law.
- (C) No, because the attorney did not represent the friend.
- (D) No, if the clerk did not charge a fee for his legal assistance.

Question 35.

One of the leading tax lawyers in the community has written a legal text primarily for lawyers on the use of gifts in estate planning. The title page states:

- (1) TAX AND OTHER
- (2) CONSIDERATIONS
- (3) IN
- (4) MAKING GIFTS
- (5) by
- (6) GEORGE P. GEORGE
- (7) Attorney
- (8) 125 Law Center Blvd.
- (9) Central City, CA
- (10) Phone: 370-0707
- (11) Author is available
- (12) to the public
- (13) for estate work

Is the title page proper?

- (A) Yes, as it stands.
- (B) Yes, but only if lines 8 through 10 are deleted.
- (C) Yes, but only if line 7 is deleted.
- (D) Yes, but only if lines 11 through 13 are deleted.

Question 36.

The law firm of Alpha, Beta & Charlie is a successful law firm in South Dakota. It engages in the general practice of law, as well as in some lobbying work in both the state capital and in Washington, D.C.

Earlier this year, Alpha, the managing partner of the firm, died suddenly of a heart attack while climbing Mt. McKinley in Alaska.

The same week, Beta was appointed to the United Nations as Under-Secretary of Cultural Affairs. Beta's appointment is for two years. The United Nations prohibits its Under-Secretaries from engaging in the outside practice of law.

The law firm must remove from its name the name(s) of:

- (A) Alpha only.
- (B) Beta only.
- (C) Both Alpha and Beta.
- (D) Neither Alpha nor Beta.

Question 37.

An attorney is admitted to the bar of and practices only in East Dakota. As a hobby, he has read extensively about the law of West Carolina, even though he has never passed the West Carolina bar exam and has never practiced law in West Carolina. Studying case law and statutes from West Carolina has made the attorney highly competent in advising clients on West Carolina law.

One day, while working in his East Dakota law office, the attorney received a call from a long-time client who was visiting West Carolina in pursuit of business interests. The client asked the attorney to advise her on West Carolina law. The attorney told the client that he was not admitted to practice law in West Carolina and that she should seek out a West Carolina attorney. The client replied that she trusted the attorney's character and judgment, she could not consult with a West Carolina attorney, and she needed an immediate reply since she had to make a time-sensitive decision. The attorney then advised the client on West Carolina Law.

Is the attorney subject to discipline?

- (A) Yes, for giving advice on a state's law where the attorney was not admitted.
- (B) Yes, but only if the attorney did not charge a fee for the advice given.
- (C) No, because the attorney was the client's attorney for other matters.
- (D) No, because the attorney was sufficiently competent to give advice on West Carolina law.

Question 38.

The law firm of Alpha and Beta has 23 lawyers. The firm has a profit sharing plan into which some of the law firm's legal fee profits are deposited each year. The profit sharing plan provides retirement benefits to its participants who reach the age of 59½. Only the lawyers in the firm participate in the plan.

Earlier this year, the law firm hired an office manager for the law firm. She has a master's degree in business administration, but is not a lawyer or a law school graduate. At a partners' meeting, the partners voted to let her participate in the law firm's profit sharing plan.

Is the firm's plan proper?

- (A) Yes, if none of the plan's contributions can be traced back to legal fees.
- (B) Yes, even though the plan was funded by legal fees.
- (C) No, unless the office manager dies in which case the law firm may pay the office manager's estate.
- (D) No, fee-splitting with a nonlawyer is prohibited.

Question 39.

A newly admitted attorney setting out to build a practice placed an advertisement in the classified section of the local newspaper. It truthfully stated that she is fluent in Spanish, obtained M.B.A. and LL.M. degrees from Harvard, accepts payment of fees by credit card, and that her practice is limited exclusively to matrimonial law.

Is the attorney's advertisement proper?

- (A) No, because it lists her fluency in Spanish which is not relevant to the practice of law.
- (B) No, because it lists her degrees and an exclusive practice area, which impermissibly attempt to bolster her qualifications.
- (C) No, because lawyers may not accept legal fees through credit cards.
- (D) Yes, in its entirety.

Question 40.

A judge had been on the bench for over 20 years. She had an exemplary record and she was highly respected by the bar in her community.

In prior years, the judge won her elections purely on her record and without much effort. However, this year, she is facing several strong competing candidates and a political climate somewhat adverse to her party; unfortunately, the party has not performed well on the national level, and it has begun to impact local sentiment.

Accordingly, for this election campaign, the judge wishes to (1) set up a committee to seek contributions to finance her election campaign; (2) contribute reasonable sums of money to other candidates; and (3) attend and speak at local political gatherings.

If the judge carries out her three goals, is her conduct proper?

- (A) Yes, as to all three goals.
- (B) Yes, as to (1) and (2), but she may not speak at political gatherings.
- (C) Yes as to (1) and (3), but she may not contribute money to other candidates because of the appearance of impropriety.
- (D) Yes, as to (2) and (3), but, as a sitting judge, she may not solicit funds directly or indirectly for her election campaign.

Question 41.

An attorney drew a will for a client through which the client left his estate to charity. When the client died, his executor, through another lawyer, duly filed the will for probate. Thereafter, the client's widow consulted the attorney concerning the client's lack of testamentary capacity when the client executed his will. The attorney believed that the widow had valid grounds for objection, and, on the widow's behalf, filed objections to the probate of the client's will. The retainer agreement prepared by the attorney for the widow's case provides that the widow will not settle her claim without the attorney's consent.

Is the attorney's conduct proper?

- (A) No, because of his representation of the widow only.
- (B) No, because of the retainer agreement only.
- (C) Yes, both the representation and the retainer agreement are proper.
- (D) No, neither the representation nor the retainer agreement is proper.

Question 42.

An attorney had represented a doctor on a number of legal matters over the last ten years. One day, while in his law office, the attorney received a telephone call from the doctor inviting the attorney to lunch.

At lunch, the doctor asked the attorney to review several documents including an old certified deed, a seven-year-old survey, and a title abstract prepared by an abstract company a month earlier. The documents and the conversation revealed that the doctor was very interested in purchasing a farm that was adjacent to a proposed interstate highway exit being discussed by the State Department of Highways.

That weekend the attorney, unbeknownst to the doctor, purchased the farm in the name of a corporation that the attorney had established two years earlier.

Is the attorney subject to discipline?

- (A) Yes, but only if the sales price was below current market value.
- (B) Yes, unless the doctor first consented to the attorney's conduct.
- (C) No, if the information concerning the land's availability for purchase had become generally known.
- (D) No, because the attorney did not disclose any confidential information in making the purchase.

Question 43.

After he was indicted for robbery and murder, a defendant consulted an attorney and requested that the attorney defend him. During their preparation for trial, the defendant confessed to the attorney that he had committed the robbery for which he had been charged.

The prosecutor informed the attorney that the attorney could not interview the prosecutor's chief witness. The attorney ignored the prosecutor's directive and interviewed the witness.

During the defendant's ensuing trial, the attorney cross-examined the prosecution's chief witness using information he had obtained from the earlier interview. The attorney also introduced the testimony of an alibi witness, who claimed that, at the time the crime was committed, the defendant was traveling with him in another state.

Is the attorney subject to discipline?

- (A) Yes, unless he obtained permission from the court to interview the prosecutor's chief witness.
- (B) Yes, for perpetrating a fraud on the court.
- (C) No, if he served due notice on the prosecutor of the time and place of the interview of the prosecutor's chief witness.
- (D) No, if he served due notice on the prosecutor of the alibi witness's intended testimony.

Question 44.

After learning, to her surprise, that she had been disinherited by her father and that his will left everything to her stepmother, a client retained an attorney to contest the will's validity on the ground of undue influence.

After pleadings were served and pretrial discovery was completed, the case was set for trial.

Just prior to the trial, the parties agreed to a settlement in which the client agreed to drop her lawsuit in exchange for \$100,000. In addition, the stepmother agreed to give the client a valuable baseball card collection once cherished by the client's father.

After the attorney sent the client his bill for legal services (\$22,000), the client and the attorney met at the attorney's office to discuss the bill. They agreed that the attorney would accept the aforementioned baseball card collection, which the parties agreed had a fair market value between \$20,000 and \$24,000. At the meeting the client took the cards from a shoe box she was carrying and handed them to the attorney.

Is the attorney subject to discipline?

- (A) Yes, if the client was not advised to seek independent counsel and the arrangement was not in a writing signed by the client.
- (B) Yes, because a lawyer cannot be paid from the subject matter of the representation.
- (C) No, if the transaction was fair and reasonable.
- (D) No, because a lawyer and client are free to negotiate the payment of a fee.

Question 45.

In preparation for a murder trial, a prosecutor interviewed a state trooper who was present when the defendant allegedly confessed to committing the murder.

During the interview, the state trooper told the prosecutor that he felt too many restraints were being put on law enforcement officials by the judicial branch through its interpretation of the Fourth, Fifth, and Sixth Amendments to the United States Constitution. Knowing that the state trooper would be a critical witness at the trial, the prosecutor did not disclose this statement to the defendant's attorney.

Is it proper for the prosecutor to withhold this information from defense counsel?

- (A) Yes, because of the duty of loyalty and confidentiality owed to the state trooper as a witness.
- (B) Yes, because the evidence does not tend to negate the defendant's guilt.
- (C) No, because a prosecutor has a duty to provide any and all favorable information to the defense.
- (D) No, because such information would mitigate the offense or reduce the punishment.

Question 46.

An adult patient sued his doctor for medical malpractice. The patient's claim was that the doctor negligently failed to fully inform the patient of the significant risks involved in the operation. However, before the operation, the patient told the doctor, "don't tell me anything about the operation that will upset me any more than I am now." The patient informed his attorney of this statement before the suit was filed.

The doctor is outraged and emotionally distressed by the lawsuit. The doctor believes that the patient's suit is groundless but still damaging to her reputation. The doctor insists that his lawyer sue the patient's attorney for intentional infliction of emotional harm.

Is the doctor's lawyer subject to discipline if she files suit at the doctor's behest against the patient's attorney for intentional infliction of emotional harm?

- (A) Yes, unless she believes that filing the suit may help in the settlement of the patient's claim against the doctor.
- (B) Yes, unless she can make a good faith argument in support of the doctor's position.
- (C) No, unless she believes that the doctor's position ultimately will not prevail.
- (D) No, because she filed the suit at doctor's insistence.

Question 47.

Harry and Albert have been indicted for conspiring to kill Wanda. Both have gone into hiding, and the police are searching for them.

On her way out of the courthouse, the District Attorney made the following public announcement:

- I “Harry and Albert have been indicted by the grand jury. This is merely an accusation and the defendants are presumed innocent until and unless proven guilty.”
- II “Harry and Albert live within the county and both are unmarried carpenters.”
- III “Harry and Albert are headed north and no attempt to apprehend them should be made.”

Which statements are proper?

- (A) Only I and II.
- (B) Only I and III.
- (C) Only II.
- (D) I, II, and III.

Question 48.

A judge asked an attorney, who had been admitted to practice only three years earlier, to represent an indigent defendant when the conflict of interest prevented the Legal Aid Society from representing him. The attorney’s practice focused solely on civil matters; he did not know anything about criminal law; he had not taken criminal law in law school; nor had he handled any criminal law cases in his practice.

Is it proper for the attorney to undertake this representation?

- (A) Yes, if the attorney does not charge a fee.
- (B) Yes, if the attorney can become competent in criminal law without undue delay to the client.
- (C) No, if the attorney accepts the case simply to gain favor with the judge.
- (D) No, because the attorney has never handled a criminal matter before.

Question 49.

The State of North Aricota is suffering from a huge budgetary deficit. Part of the state's concern is that much of its skilled labor is commuting from outside the state, consequently earning money in the state but spending it outside. North Aricota's legislature believes that this pattern has caused a drain on the state's economy, particularly through the loss of sales tax revenue.

One industry that has been specifically targeted by North Aricota is the legal field. The legislature is particularly concerned that so many nonresidents are applying to be admitted to the bar.

To cut down on this pattern, North Aricota now requires bar applicants to not only pass the bar examination, but also to be North Aricota residents and maintain a law office within the state.

Are these requirements proper?

- (A) Yes, state residency and law office maintenance are proper requirements for bar admission.
- (B) No, because the state cannot require the maintenance of an in-state law office.
- (C) No, because the state cannot require residency as a condition to bar admission.
- (D) No, because neither state residency nor law office maintenance is a proper requirement for bar admission.

Question 50.

Two attorneys, Larry and Arno, graduated from law school together, passed the exam on the first try, and set out to work in big city law firms. As the long hours and days began to mount, the two drifted apart and had not seen each other in several years.

Larry and Arno recently found themselves on opposite sides of an intense litigation. Larry, who represented the plaintiff, prevailed in the lawsuit, and final judgment was entered. Larry knows that the reason for the plaintiff's victory was Arno's failure to present a critical and obvious defense at trial. Larry believes that Arno's grossly inadequate preparation was the cause of Larry's landslide victory.

What is the proper action for Larry to take?

- (A) Report Arno's failure to adequately prepare to Arno's client.
- (B) Report Arno's failure to adequately prepare to the State Bar, but only after obtaining the plaintiff's informed consent to do so.
- (C) Remain silent about Arno's failure to adequately prepare, so as not to upset plaintiff's favorable result.
- (D) Remain silent about Arno's failure to adequately prepare, unless Larry believes such conduct by Arno is habitual and likely to recur.

Question 51.

A dentist maintained a very active professional practice. Unfortunately, on frequent occasions she was required to sue her patients to recover unpaid bills.

Five years ago, the dentist retained an attorney to represent her in actions to recover unpaid bills from her patients. For this work, the attorney has always charged the dentist a one-third contingency fee based on the net recovery, after deducting out-of-pocket costs and expenses.

Last month, the dentist referred another collection matter to the attorney. In doing so, she mailed to the attorney the paperwork that supported the claim for a recovery. Upon receipt of that paperwork, the attorney commenced suit against the dentist's patient.

Is the attorney subject to discipline if the attorney does not obtain a detailed, written retainer agreement signed by the dentist?

- (A) Yes, because all contingent fee arrangements require a writing signed by the client.
- (B) Yes, but while the contingency agreement need be reduced to a writing, it need not be signed by the client.
- (C) No, because the attorney was regularly representing the attorney and the rate was previously fixed.
- (D) No, because, although the rate of the fee should be communicated to the client, the communication need not be in writing.

Question 52.

A client telephoned his attorney, and the attorney's secretary informed him that the attorney was not available because she was in a meeting. Desperate, the client whispered to the secretary, whom he had met on prior visits to the attorney's office: "Listen, I just accidentally shot my business partner in a hunting accident. Everyone will think it was murder because my partner and I have been feuding. I need the attorney's help. Please get her on the phone right away!"

The secretary interrupted the attorney's business meeting and asked the attorney to come to the phone immediately. The attorney excused herself and spoke with the client in private.

The client was indicted for the killing of his partner, and the prosecutor plans to subpoena the attorney and the secretary to testify at the trial.

Which of the following is correct?

- (A) Only the attorney may quash her subpoena.
- (B) Only the secretary may quash her subpoena.
- (C) Both the attorney and the secretary may quash their subpoenas.
- (D) Neither the attorney nor the secretary may quash their subpoenas.

Question 53.

An attorney had represented a client for years and developed a close personal relationship with the client's family.

Late one night, the attorney received a telephone call at his home from the client's son, a college freshman, who had just been arrested for driving under the influence of alcohol and had already failed a breathalyzer test administered at the police station.

The son told the attorney that his parents were out of the country on vacation, that he had no money, and that unless the son posted a \$400 bail bond, the son would remain in jail for the weekend. The attorney knew that this amount would be forfeited if the son failed to appear at any court appearance, but the attorney honestly believed that the son presented no flight risk. The attorney also felt that \$400 would not be a significant loss if it was forfeited, and, in any event the client would reimburse him for this amount. The attorney posted the \$400 cash bond.

Is it proper for the attorney to personally post the son's bail?

- (A) No, because of the per se prohibition against a lawyer posting a bail bond for a current client.
- (B) No, a lawyer shall not provide financial assistance to a client in connection with a pending litigation.
- (C) Yes, unless the son flees the jurisdiction.
- (D) Yes, if the attorney's interest in recovering the bail posted will not materially limit the attorney's representation of the son.

Question 54.

Attorney Alpha, a sole practitioner, represented Plaintiff in litigation against Defco. Defco was represented by Attorney Bravo, who worked in a law firm.

During the course of the litigation, Alpha observed on several occasions that Bravo was drinking heavily. At court appearances, at depositions, and during settlement negotiations, Bravo was impaired by alcohol. Alpha knew that, due to Bravo's alcohol problems, Bravo had failed to comply with discovery requests, return telephone calls, and meet court deadlines. Alpha consulted with Plaintiff, who agreed to permit Alpha to make any necessary disclosures to Bravo's law partners.

Is Alpha subject to discipline for such disclosures?

- (A) Yes, unless he also reports Bravo's conduct to the proper disciplinary authority.
- (B) Yes, unless he also directs Bravo to an approved alcohol assistance program.
- (C) No, because Bravo's law partners ultimately are responsible and liable for Bravo's professional conduct.
- (D) No, because Alpha obtained Plaintiff's consent.

Question 55.

A newly admitted attorney limits her law practice to drafting and executing wills for clients. Although she is proficient in this area, she is having a difficult time increasing the size of her practice.

The attorney recently approached the president of Cardco, a credit card company with an established prepaid legal plan for subscribers. The plan offered lawyers' services at reduced costs for an annual premium prepaid by each subscribing member. Cardco agreed to refer its prepaid legal plan clients who needed wills to the attorney, who agreed to pay Cardco its usual service charges for attorneys in the plan.

Cardco then initiated a promotion for its prepaid legal plan whereby Cardco would offer two months of free legal services to all credit card holders who joined the plan. Cardco employees made cold telephone calls to cardholders to encourage them to join the plan. Cardco's employees do not know if the targeted cardholders need immediate legal services.

Is the attorney subject to discipline?

- (A) Yes, because a lawyer shall not pay a nonlawyer for referrals.
- (B) Yes, because a lawyer shall not directly or indirectly solicit employment from prospective clients.
- (C) No, because the persons solicited were not known to need legal services in a particular matter covered by the plan.
- (D) No, even if the persons solicited were known to need legal services in a particular matter covered by the plan.

Question 56.

Jason was a bouncer at a successful local topless bar owned by Jill. Jason had no ownership interest in the business nor any managerial responsibilities. One night, the police arrested Jason for "participating in a disorderly house" and for allowing prostitution on the premises. Jill was also arrested.

Fearing she might face conviction, Jill hired Bailey, the best criminal lawyer in town, and paid him a \$15,000 retainer to represent her and Jason. Further, Jill agreed to retain Bailey for \$3,000 per month for the purpose of handling any future arrests at the club.

Bailey attended Jason's arraignment. When Jason asked about the fee, Bailey told him, "Don't worry. It's been taken care of."

What is the proper course of action for Bailey to take?

- (A) Decline to accept the \$3,000 per month retainer fee from Jill until his representation of Jason is over.
- (B) Decline to represent Jason.
- (C) Represent Jason only with full disclosure to Jason of his fee arrangement.
- (D) Represent Jason zealously.

Questions 57 and 58 are based on the following facts:

The plaintiff was a passenger in a bus when it was involved in an accident with the defendant's car as the bus was making a left hand turn at an intersection. The plaintiff retained Attorney Alpha who commenced a personal injury claim suing the defendant and the owner of the bus, to recover for the plaintiff's pain and suffering resulting from her injuries. The complaint, drafted by Alpha and sworn to under oath by the plaintiff, alleged that, as a result of the injuries, the plaintiff had been physically impaired in her daily activities.

When the defendant was served with the summons and complaint, the defendant notified the liability insurance company insuring his car. The accident was covered by the terms of the policy, and the amount of the insurance coverage far exceeded the amount that the plaintiff sought in her complaint, so the defendant was somewhat relieved that any resulting judgment would not exceed the amount of insurance coverage. The insurance company has assigned Attorney Bravo to defend defendant against the plaintiff's lawsuit.

Question 57.

Bravo directed a private investigator to make an appointment at the plaintiff's place of business, a beauty parlor. While the plaintiff shampooed, cut, and set the investigator's hair, the plaintiff and the investigator engaged in small talk unrelated to the plaintiff's lawsuit or physical condition. The investigator's report to Bravo included observations that indicated that the plaintiff was not physically impaired as alleged in the plaintiff's complaint.

Is Bravo subject to discipline?

- (A) Yes, because Bravo knows that the plaintiff was represented by a lawyer.
- (B) Yes, because Bravo violated the ethical rules through the acts of another.
- (C) No, because the conversation was unrelated to the matter involved in the representation.
- (D) No, because Bravo indirectly contacted the plaintiff.

Question 58.

Is it proper for the insurance company's staff counsel to represent both the insurance company and its insured in the civil action?

- (A) Yes, as long as the staff counsel informs the defendant that staff counsel is an employee of the insurance company, and the staff counsel assigned exercises independent professional judgment in advising and representing the defendant.
- (B) Yes, even if it requires the lawyer to disclose to the insurance company detrimental confidential information received from the insured.
- (C) No, because an attorney who is an employee of the insurance company cannot also represent the insured.
- (D) No, because the determination of when and to whom the client-lawyer relationship attaches is governed by the rules of professional responsibility.

Question 59.

A client retained an attorney to pursue the client's workers' compensation claim after his hand and arm were crushed in a press machine at his place of employment.

The attorney advised the client that his representation would be limited solely to obtaining a determination of fair compensation under the workers' compensation statute before the workers' compensation board. The client agreed that the attorney would not represent the client for any other claims the client might have.

One year later, the client learned that he might have had a valid tort claim based on strict products liability against the press machine's manufacturer. Unfortunately, by the time the client learned of this claim, the statute of limitations had just expired.

Was the attorney's conduct proper?

- (A) Yes, because an attorney may limit the scope of the legal representation.
- (B) Yes, because the attorney had no duty to advise the client of the impending expiration of the statute of limitations.
- (C) No, because an attorney cannot limit the scope of the legal representation.
- (D) No, because the attorney did not properly obtain the informed consent of the client to limit the scope of the representation.

Question 60.

Attorney Alpha and Attorney Bravo were law school classmates, and both have been practicing law for the past seven years. While attending a bar association continuing legal education seminar, Alpha and Bravo renewed their old friendship.

Over the ensuing several months, Alpha and Bravo initiated discussions regarding the formation of a partnership to practice law together. In drafting the partnership agreement, they agreed that:

- I. They would share equally in all fees earned regardless of who brought the matter into the firm and regardless of the amount of work either attorney performed on the matter.
- II. They would not represent the other's clients if the firm dissolved, and that each attorney would retain her own clients.
- III. If either partner retired and sought retirement benefit payments from the firm's retirement plan, those payments would cease if the retired partner started to again practice law.

Which agreement would subject the attorneys to discipline?

- (A) II and III.
- (B) I and III.
- (C) II only.
- (D) I, II, and III.

Answer to Question 1

(C) - An attorney may not put forth frivolous arguments, even if they are in a client's best interest. Thus, choice (D) is incorrect. It is not "frivolous" to propose a "good faith" argument for the extension, modification, or reversal of existing law, however, if there is a basis in law and fact for doing so. *Rule 3.1*. Here, if the attorney had a good faith argument for modification of existing law, choice (C) is better than choice (A). Choice (B) is incorrect because theories of recovery can be developed, altered, and abolished through the judicial process, e.g., through the evolution of case law, as well as through the interpretation of legislative enactments.

Answer to Question 2

(C) - A lawyer may advance or guarantee litigation expenses, including court costs, expenses of investigation, and the costs of obtaining and presenting evidence or medical examinations. In addition, the Rules permit the advancement of court costs and expenses, the repayment of which may be contingent on the successful outcome of a case. Thus, an attorney may advance court costs and expenses for litigation knowing that, if the case is not successful, the client will not be liable for their repayment. *Rule 1.8(e)(1)*. Under the Rules, however, it remains impermissible to advance or guarantee financial assistance to a litigation client, e.g., give money to a client for living expenses, medical bills, or to pay off debts. It was, therefore, not proper for the attorney to pay or advance the funds toward the client's hospital bills, so choices (A), (B), and (D), which contain choice II, are not correct.

Answer to Question 3

(A) - Rule 8.4(c) prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation." To be subject to discipline, the lawyer need not be convicted or even charged criminally for the conduct. *See Rule 8.4(b)*. Therefore, choice (B) is not correct. Choice (C) is not correct because the conduct subjecting the lawyer to discipline can be completely unrelated to the practice of law. *A.B.A. Formal Op. 336 (1974)*. A lawyer may be subject to disciplinary proceedings for improper acts committed outside, as well as within, the jurisdiction in which the lawyer is admitted to practice. "A lawyer admitted to practice in this jurisdiction [State X] is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs." *Rule 8.5(a)*. Thus, choice (D) is not correct, and the best answer is choice (A).

Answer to Question 4

(B) - Rule 8.4 Comment 1 prohibits an attorney from directly, or indirectly through the acts of others, engaging in fraud, deceit, or misrepresentation. Although lawyers are encouraged to delegate functions to paralegals and clerks, lawyers are responsible for supervising delegated work and cannot delegate that which constitutes the practice of law. *Rule 5.3*. Moreover, Rule 5.4(b) prohibits lawyers from entering a partnership (or forming a corporation) with a nonlawyer if any of the anticipated activities constitute the practice of law. Here, the attorney retained no control over the collection agency manager's use of his stationery and, therefore, exhibited no supervisory oversight. Thus, choice (B) is correct and choice (D) is incorrect. While threatening legitimate

litigation is not improper, choice (C) finds the attorney not subject to discipline here and is consequently incorrect. Finally, the improper conduct here did not rise to the level of extortion, thus choice (A) can be eliminated.

Answer to Question 5

(D) - The United States Supreme Court has held that states do not have a “substantial interest” in suppressing non-misleading attorney advertising because states cannot support the contention that harm would result from such truthful advertising. *Zaudner v. Ohio*, 471 U.S. 626 (1986); see *Rules 7.1 & 7.2(a)*. Accordingly, information that the attorney speaks Spanish, accepts credit cards, and works with clients who permit her to advertise the fact that they are represented by the attorney are all proper for inclusion in her advertisement. Thus, choice (D) is the best choice.

Answer to Question 6

(D) - Rule 1.7 precludes lawyers from undertaking the representation of new clients whose interests are adverse to those of an existing client. See *Rule 1.7 cmts. 29-33*. Moreover, “continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests and the right to expect that the lawyer will use that information to the client’s benefit.” *Rule 1.7 cmt. 31*; see also *Rule 1.4 (communication with client)*. Thus, the attorney may not undertake to prepare the wife’s new will, and choices (A) and (B) are not correct. Note also, however, that Rule 1.6 requires that client confidences may not be revealed. Thus, the attorney may not reveal the wife’s secrets and confidences to the husband, making choice (D) better than choice (C).

Answer to Question 7

(A) - A lawyer is generally prohibited from acquiring a proprietary interest in the cause of action or the subject matter of the litigation. *Rule 1.8(i)*. This prohibition, however, does not preclude a lawyer from acquiring a lien to secure payment of the lawyer’s fee. *N.Y. State 550 (1983)*; *A.B.A. Informal Op. 593 (1962)*. “When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer’s efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by [Rule 1.8(a) (it must be fair and reasonable, full disclosure must be made in writing, the client must be advised to seek independent counsel, and the client must consent in writing)].” *Rule 1.8(i) cmt. 16*. Thus, choice (A) is correct and choices (C) and (D) are not. Of course, fee arrangements between lawyers and their clients are always subject to scrutiny, and thus choice (B) is incorrect.

Answer to Question 8

(B) - *Rule 8.4(c)* prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation.” A deliberate failure to disclose a fact can be deceit or a misrepresentation. Rule 7.1 Comment 2 defines a misleading statement as a truthful statement that “omits a fact

necessary to make a lawyer's communication considered as a whole not materially misleading." Here, the attorney's nondisclosure constitutes deceit or at least a misleading omission, and thus choice (B) is the best answer. That the attorney does not practice law or that he does not have an attorney-client relationship with the investor does not shield the attorney from discipline. See *Rule 8.4 annot. (2011)* ("Rule 8.4 is not limited to the confines of the lawyer-client relationship, but reaches conduct outside the practice of law."). Indeed, the investor need not be aware of the attorney's status as a lawyer for the attorney to be subject to discipline. Thus, choice (C) is not correct. Finally, an attorney may conduct business and other investment dealings with clients seeking legal or other advice, but the relationships are subject to full disclosure and the Rules of Professional Responsibility, so choices (A) and (D) are not correct.

Answer to Question 9

(B) - The answer is found in Rule 1.12(a), which states that "[a] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a Judge ... unless all parties to the proceedings give informed consent confirmed in writing."

The written consent of both parties here would enable the judge to participate in the case and screening would not be required. Thus, choice (B) is better than choice (A). Note that if the judge were disqualified, his law firm could still represent a party in the matter without obtaining the informed consent of all involved provided the judge was screened from all participation and written notice of the screening was given to the new judge. *Rule 1.12(c)*. Finally, because consent has been obtained, choice (C) is not correct. The judge's beliefs on settlement are not relevant to any inquiry, so choice (D) is not correct.

Answer to Question 10

(C) - A lawyer who receives a client's funds for any reason has a duty to establish an escrow account and deposit the funds therein. *Rule 1.15*. Alternatively, he can forward payments directly to the client. The lawyer also has the ethical duty to promptly notify a client or third person of the receipt of funds, securities, or other properties in which a client or third person has an interest. In addition, the lawyer is obligated to safeguard the funds, maintain complete records of them, and promptly pay or deliver them to the client. *Rule 1.15(a)*. Thus, choice (C) is the better answer than choices (A) and (B).

The lawyer may not, even momentarily, deposit the funds in an account other than an account specifically designated as an escrow account. Thus, the attorney may not deposit the funds into his personal account, and choice (D) is not correct.

Answer to Question 11

(A) - Rule 6.4 states "[a] lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client." Thus, choice (A) is correct, not choice (B).

Rule 6.4 Comment 1 further states “[a] lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.” There is no impermissible conflict of interest here, and, thus, choices (C) and (D) are not correct.

Answer to Question 12

(C) - It is unethical for a lawyer to discuss the subject matter of the representation with any party the lawyer knows to be represented by another lawyer, unless the lawyer first obtains the consent of the other lawyer or is authorized to do so by law or court order. *Rule 4.2*. Thus, choice (C) is the best answer. It is of no consequence that the plaintiff initiated the discussion; the defendant’s attorney should have “immediately terminate[d] the conversation.” *Rule 4.2 cmt. 3*. Thus, choice (A) is incorrect. Also, even though the settlement is encouraged, the ethical rules may not be broken in procuring even a fair and equitable resolution. Thus, choice (B) is incorrect. Finally, choice (D) is not correct because the prohibitions against ex parte communications concern communications between one party and the court, not between one party’s counsel and another party.

Answer to Question 13

(C) - A law firm may use the name of a deceased or retired partner as long as the firm is a bona fide successor of a firm in which the deceased or retired person was a member. *Rule 7.5 cmt. 1*. If a partner retires from active practice and becomes of counsel, the lawyer’s name can be retained in the firm’s name. *A.B.A. Formal Op. 357 (1990)*. Thus, choice (D) is incorrect. The facts do not indicate that the attorney is no longer a lawyer, so choice (A), while legally true, is not factually correct. The Rules do not prohibit firms from retaining a retired lawyer’s name in the firm name while properly employing the lawyer in an “of counsel” relationship, so choice (B) is incorrect.

The Rules do not specifically discuss the “of counsel” relationship. The title “of counsel” generally identifies a person who is neither a partner/member of the firm (with an ownership interest) nor an associate. “The word counsel can be used to identify the relationship of a lawyer or law firm with another lawyer or firm, as long as the relationship between the two is a close, regular, and personal one and the use of the title is not otherwise false or misleading.” *Robert R. Keatinge & Allan G. Donn, Legal Relationships within the Firm, 14 The Compleat Lawyer 14, 20 (1997); A.B.A. Formal Op. 357 (1990)*. As the relationship here appears to be close, regular, and personal, it will likely be proper. Thus, choice (C) is the best choice.

Answer to Question 14

(D) – The attorney must refuse to discuss the matter with the claimant, but may refer the claimant to another lawyer. Thus, choice (D) is the best answer. Even though the attorney’s representation is over, her duty of confidentiality continues. *Rule 1.9*. She cannot discuss or accept new employment involving the same or a substantially related matter on which she previously worked without the former client’s consent when the representation is materially adverse to the interests of the former represented client. *Rule 1.9*. Thus, choices (A) and (B) are

not correct. Likewise, the attorney's firm is vicariously disqualified by association and, thus, the attorney may not refer the matter to an associate in her firm. "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 [conflict with a current client] or Rule 1.9 [conflict with a former client]." *Rule 1.10(a)*. Thus, choice (C) is not correct.

Answer to Question 15

(D) - Since the new representation of the client did not involve the same matter or matters substantially related to the attorney's former representation of Wallmart, the attorney may undertake the new employment. Thus, choice (D) is correct and choices (A) and (C) are incorrect. Note that, if the attorney possessed confidential information that could be used to the disadvantage of the former client in this new matter, then she would be required to decline the employment, because an attorney may not disclose or use the confidential information of a former client to the disadvantage of the former client. *Rule 1.9*. The Rules contain no consent requirements in this situation, and thus, choice (B) is not the best answer.

Answer to Question 16

(C) - Although the plaintiff actually benefitted from the attorney's misconduct in the form of an award substantially larger than the settlement offered, injury to a client is not required to establish unethical conduct by a lawyer. Moreover, there is no "no harm, no foul" rule in attorney ethics. Thus, choice (B) is incorrect.

Here, the attorney committed a serious disciplinary offense even though the plaintiff may not have been aware of it. Rule 1.2(a) unequivocally states that the final decision as to settlement rests with the client alone, but the client in this case was blocked from making the decision by the misconduct of the attorney. The attorney should have communicated the offer and then advised the plaintiff to reject it. The attorney's failure to communicate such critical information to the plaintiff was a clear violation of Rule 1.4(b). Thus, choice (C) is correct.

Whether the matter was undertaken on a contingency fee basis is irrelevant. The attorney here failed to advise the plaintiff of a settlement offer and would be subject to discipline. Thus, choice (D) is incorrect. Moreover, while the attorney is responsible for litigation procedure and tactics, the obligation to relay settlement offers is not excused here. Thus, choice (A) is incorrect.

Answer to Question 17

(B) - There is no *per se* rule against common representation which is why choice (C) is incorrect, but there are several guiding principles in Rule 1.7 Comment 29. If the relationship between the parties has already encountered antagonism or litigation, or contentious negotiations between them are imminent or contemplated, the Rules advise against common representation. Here, the negotiations were completed by a broker and the parties have reached an agreement on the material terms. It appears that the attorney need only reduce those terms to a legal writing. Thus, the attorney may properly represent the owner and the buyer under the circumstances, making choice (B) the best choice. Moreover, this question does not involve the aiding of another

(the broker) in the unauthorized practice of law, so choice (D) is incorrect. Finally, though the attorney is “practicing law,” even if she were not, her conduct still would be subject to the Rules. Thus, choice (A) is not the best choice.

Answer to Question 18

(A) - Rule 1.5(d)(1) prohibits a contingent fee in any domestic relations matter in which recovery is contingent upon securing a divorce or “upon the amount of alimony or support, or property settlement in lieu thereof.” The bar on such contingent fees in domestic relations matters renders moot inquiries into the reasonableness of the contingent fee. Consequently, choice (A) is correct, and choices (B), (C) and (D) are incorrect. Note that this prohibition does not apply to post-divorce contingent fees to collect arrears due for child support or alimony. *Rule 1.5 cmt. 6.*

Answer to Question 19

(A) - Rule 8.4(c) states that it is professional misconduct for a lawyer to engage in “conduct involving dishonesty, fraud, deceit or misrepresentation.” This rule applies whether or not the lawyer is acting in his or her capacity as a lawyer. Thus, choice (A) is correct and choice (D) is not. Also, Rule 5.4(c) prohibits a lawyer from allowing a third person who recommends the lawyer’s services, regardless of whether that conduct involves the actual practice of law, from interfering with the lawyer’s ethical practice of law. Thus, choice (C) is not correct. Finally, a lawyer may represent (or serve as escrow holder for) parties on both sides of a transaction as long as no conflict of interest exists. *See Rule 1.7 and Annotation.* As the facts do not indicate a conflict here, choice (A) is a better answer than choice (B).

Answer to Question 20

(C) - This problem is governed by Rule 1.18 (“Duties to Prospective Client”). “Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation....” *Rule 1.18(b).* Moreover, a lawyer “shall” not represent a client with interests materially adverse to those of another client in that matter “if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.” *Rule 1.18(c).*

Here, the attorney should not represent Baker. The critical information (i.e., the facts and potential problems) that the attorney obtained during the brief consultation with Able precludes the attorney from representing anyone on the matter who has an interest adverse to Able’s. Thus, choice (C) is correct and choice (B) is not. Further, choice (A) ignores the conflict of interest, choice (D) is not legally relevant, and choice (B) is not factually relevant.

Answer to Question 21

(A) - Rule 1.7(a)(2) prohibits representation of a client if the representation may be materially limited by the lawyer’s own interest, unless the lawyer reasonably believes the lawyer’s judgment will not be adversely affected and the client consents after full disclosure. Here, Beta’s strong personal and political views would prevent Beta from undertaking the client’s

representation but would not affect Alpha from undertaking the representation. Thus, choice (A) is the best choice.

Rule 1.10 speaks of vicarious disqualification: if one attorney is disqualified from representing a client under Rule 1.7, then none of the attorneys in the firm shall knowingly represent the client. However, as a result of the 2002 amendments to Rule 1.10(a), Beta's conflict is not imputed to the law firm since it is grounded in a "personal interest" of the prohibited lawyer (*i.e.*, Beta) and "does not present a significant risk of materially limiting" Alpha's representation of the client. Thus, choice (C) is incorrect. Choice (B) is not correct because Beta has a personal interest conflict. Choice (D) is not the best choice because the facts, while stating that Alpha and Beta work well as a team, in no way indicate that Alpha's representation of the client will suffer as a result of Beta's absence from the legal team.

Answer to Question 22

(A) - It is not improper for a lawyer to interview an adverse fact witness or to investigate that witness's background in preparation for appeal, as long as the lawyer does not harass the witness and the witness is not represented by counsel. *Rule 4.2 annot. (2011)*. In addition, after a jury has been discharged, the lawyer, if not prohibited by local court rules, may have discussions with the jurors, provided the lawyer respects the jurors' desire not to talk with the lawyer, and the lawyer's communication does not involve misrepresentation, coercion, duress, or harassment. *Rule 3.5(c)*. Because the contacted persons willingly spoke to the attorney and no local rules prohibiting the contact were mentioned, choice (A) is the best choice and choice (C) is incorrect. The attorney need not obtain opposing counsel's prior consent, so choice (B) is not correct. Finally, because the Rules state that a lawyer may communicate with a juror *unless* local court rules prohibit such communication, choice (D) is not the best choice.

Answer to Question 23

(D) - Although pro bono services remain voluntary, every lawyer, regardless of workload or professional prominence, has a "professional responsibility" to donate legal services to those unable to pay. *Rule 6.1*. In addition, when the court appoints a lawyer to represent a client who is otherwise unable to obtain counsel, the Rules state that a lawyer "shall not seek to avoid this appointment" except for good cause, *i.e.*, some compelling reason. Such "good cause" is limited to the following circumstances:

- (a) representing the client would likely violate ethical rules (*see Rule 1.16(a)*, *e.g.*, the lawyer is not competent to undertake the matter, or by doing so, the proposed representation would create a prohibited conflict of interest);
- (b) the representation would result in an *unreasonable* financial burden on the lawyer, or
- (c) the case is *so repugnant* to the lawyer that it would impair the lawyer's ability to represent the client. *Rule 6.2*.

Here, the attorney does not have "good cause" to decline the judge's appointment. As a former prosecutor, he is likely competent to handle the matter, and it is clear from the facts that his

hesitation is not based on his lack of competence, but rather is based on his desire to stay clear of an unpopular defense. Thus, choice (D) is the best answer, and choice (A), focusing on negative publicity, does not amount to “good cause.” Moreover, the attorney’s service as a prosecutor is not likely to give rise to a conflict where the defendant is a first time offender, so choice (B) is not the best answer. Finally, choice (C) is not the best answer because even if the attorney believes that the defendant is guilty, he can still provide the indigent accused with a proper and zealous defense. A belief in guilt does not necessarily give rise to the repugnance mentioned above.

Answer to Question 24

(B) - Rule 4.2 restricts a lawyer’s communication with parties represented by counsel when those communications are made in the course of “representing a client.” However, when a lawyer is not “representing a client,” but rather is a party to the action, Rule 4.2 does not provide specific guidance. Indeed, the Comment to Rule 4.2 states that “parties to a matter may communicate directly with each other.” *Rule 4.2 cmt. 4*. Thus, choice (B) is better than choice (C).

Opinion 81-8 of the Association of the Bar of the City of New York permits such communications without the consent of opposing counsel, but cautions that the lawyer should avoid overreaching, should not allow knowledge of the law to undermine the other party’s relationship with counsel, and should not communicate if the other party expresses a desire to communicate only through counsel. *See also Virginia State Bar Op. 771; Rule 4.2 cmt. 1*. The proper communications described herein do not give rise to an appearance of impropriety, so choice (D) is not correct. Choice (A) is breathtakingly overbroad. Attorney speech can be restricted, for example, in the areas of advertising, misrepresentation, and public speech involving a matter in litigation. Thus, choice (A) is not the best choice.

Answer to Question 25

(B) - The settlement and its discussion were proper because the seller’s attorney did not engage in any deception or misrepresentation, nor did she engage in communications with a party she knew to be represented by counsel. In that regard, she properly ended the conversation with the buyer at the first opportunity. Moreover, the seller’s attorney properly disclosed to the buyer’s lawyer the chance meeting she had with the buyer. Thus, choice (B) is the best answer, and choice (C) is incorrect. Choice (D) is incorrect because a party is free to convey a settlement offer. Choice (A), which is not a correct ethical rule, is not the best answer.

Answer to Question 26

(C) - Rule 8.1 requires candor in proceedings for admission to the bar and requires the avoidance of dishonesty, fraud, deceit, or misrepresentation. Rule 8.1(a) states that “[a] lawyer in connection with a bar admission or a disciplinary matter, shall not ... knowingly make a false statement of material fact.” The attorney’s affirmation recommending the son to the bar must be based upon her own personal knowledge of the son’s character and fitness. Thus, choice (C) is the only correct answer. Neither the truthfulness of the statements nor the attorney’s beliefs are relevant, so choices (A) and (B) are not the best answers. Finally, choice (D) is not correct because whether or not the client’s assurances of her son’s character were made under oath, they are not a proper basis for the attorney to personally attest to the son’s fitness to be a lawyer.

Answer to Question 27

(D) - Rule 8.4(c) prohibits a lawyer from engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation.” A.B.A. Informal Op. 86-1518 (1986) specifically addresses the lawyer’s duty when the attorney discovers an inadvertent error or omission in the drafting of a contract. Here, Alpha is ethically obligated to contact Beta and correct the error. Thus, choice (C) is not correct. Moreover, choice (B) is not correct because Alpha need not consult the player prior to contacting Beta; the client had already made an informed decision based on the correct compensation figures, and this disclosure is not one requiring client consent. Indeed, to permit the player to take unfair advantage of the error, Alpha would be counseling or assisting his client in fraudulent conduct. *Rules 1.2(d) and 4.1(b)*. Finally, this error does not involve any client secret or confidence, let alone a protected one, so choice (A) is not correct.

Answer to Question 28

(D) - If a lawyer can make a good faith argument for a client’s position, “[s]uch action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail.” *Rule 3.1 cmt. 2*. Thus, choice (A) is not correct and choice (D) is correct.

“Before the 2002 amendments, the Comments to the rule stated that an action would be considered frivolous if the ‘client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person’.... However, in 2002, this language was deleted ‘because the client’s purpose is not relevant to the objective merits of the client’s claim’....” *Rule 3.1 annot. (2011)*. Here, there was ill will, but the client had a legitimate basis on which to sue for trespass. Thus, choice (B) is not correct. Choice (C) is too broad to constitute a valid rule of law.

Answer to Question 29

(D) - A lawyer who learns that the client has perpetrated a fraud upon a tribunal during the course of representation must take reasonable remedial measures including urging the client to rectify the fraud. If the client refuses or is unable to do so, the lawyer must reveal the fraud to the tribunal. *Rule 3.3(a)(3)*.

“[A] lawyer may be surprised when the lawyer’s client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during direct examination or in response to cross-examination by the opposing lawyer.... In such situation, the advocate’s proper course is to remonstrate with the client confidentially, advise the client of the lawyer’s duty of candor to the tribunal and seek the client’s cooperation with respect to the withdrawal or correction of the false statements or evidence. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal ... even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.” *Rule 3.3 cmt. 10*. Thus, choice (D) is better than choice (B).

Note that, under Rule 3.3, a lawyer may not knowingly introduce perjured testimony, whether or not the witness is a client. The Rules require that the attorney take remedial measures, even if such methods require disclosure of the client’s confidences and secrets, because perjured

testimony given by a client during the course of the attorney's representation is not protected by the attorney-client privilege.

Here, choice (A) is not the best choice, because the attorney should first consult with the client to seek the client's cooperation to correct or withdraw the perjured testimony. Choice (C) is not correct because the language added in 2002 to Rule 2.2 Comment 2 states that a lawyer "must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false." *Rule 3.3 cmt. 2.*

Answer to Question 30

(D) - Rule 1.16(a)(1) mandates withdrawal if continued representation will result in violation of the Rules. "Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation of the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require withdrawal should avoid prejudicing the client. Thus, choice (D) is better than choice (B). Choice (A) is incorrect because Rule 3.1 states that a lawyer shall not take frivolous action, even if the client demands it. Choice (C) is incorrect because an attorney must comply with a client's wishes or withdraw; an attorney cannot just ignore a client's directive.

Answer to Question 31

(C) - Whether counsel may submit papers to an unrepresented party whose interests are in conflict with the lawyer's client "depends on the experience and sophistication of the unrepresented person, as well as the settings in which the behavior and comments occur." *Rule 4.3 cmt. 2.* Rule 4.3 further states that "[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested."

"This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.... [T]he lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document...." *Rule 4.3 cmt. 2.* Here, the attorney made it clear that he would represent only the interests of the wife. Thus, choice (C) is the best choice and (A) is incorrect. As for choices (B) and (D), the correspondence need not be in writing and the facts do not indicate that the husband is indigent.

Answer to Question 32

(C) - Under Rule 1.2(a), whether to settle a matter is the client's decision. A lawyer has a duty to inform clients of settlement offers to enable them to make an "informed consent." *Rule 1.4.* The duty of a lawyer to promptly inform a client of any settlement offer is excused "if the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer." *Rule 1.4 cmt. 2.* "Although a client may grant the lawyer express authority to settle, a retainer agreement that forbids the client from

settling ... without the lawyer's consent ... may be found to be against public policy and impermissible under Rule 1.2(a)." *Rule 1.2 annot. (2011)*. The lawyer cannot retain the ultimate decision about whether to accept or reject a settlement offer or how much will be allocated to each client. Thus, choice (A) is incorrect.

Additionally, Rule 1.8(g) states that "[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims [here \$100,000] ... unless each client gives informed consent, *in writing signed by the client*." Thus, choice (B) is incorrect, and choice (C) is the best answer. As Rule 1.8(g) makes clear, a lawyer can accept an aggregate settlement offer, and thus choice (D) is incorrect.

Answer to Question 33

(D) - Although there is a duty for an attorney to disclose direct adverse legal authority in the controlling jurisdiction which has not been disclosed to the court by the opposing party (*Rule 3.3(a)(2)*), there is no ethical duty, under the adversarial system, to disclose adverse factual evidence. Thus, choice (D) is the best answer.

Answer to Question 34

(B) - The key to this question is to recognize that the clerk is not admitted to the bar, yet he is rendering legal assistance to a third person. A nonlawyer impermissibly engages in the unauthorized practice of law when he or she, like the clerk here, applies the law to the facts of a particular case.

Choice (B) is the best choice. Rule 5.5(a) prohibits a lawyer from assisting another in the unauthorized practice of law. Here, the clerk, a nonlawyer, was rendering legal advice to a third person. By assisting the clerk (briefing him on the law and providing him with legal forms) in the clerk's representation of his friend, the attorney knowingly assisted a nonlawyer (the clerk) in the unauthorized practice of law.

A lawyer is guilty of neglect when there is an existing attorney-client relationship and the lawyer does not competently and diligently see the legal matter through to completion. Under the facts, there simply was no attorney-client relationship undertaken by the attorney to represent the clerk's friend. Thus, choice (A) is not correct.

Choice (C) is not correct because the attorney was not absolved of the unethical transgression simply because the attorney did not undertake to represent the clerk's friend. The ethical transgression here occurred when the attorney became aware that the clerk was giving legal advice to another, amounting to the unauthorized practice of law, and the attorney knowingly provided assistance. Finally, choice (D) is not correct, because whether a fee is charged is not relevant. It is the clerk's providing legal advice and the attorney's knowing assistance that are improper.

Note that if the friend had decided to represent himself, unaided by the clerk, there would not be a problem. A nonlawyer may represent himself or herself, and a lawyer who assists such

person is not aiding in the unauthorized practice of law, because pro se litigants are “authorized” to represent themselves.

Answer to Question 35

(A) - Clearly, a lawyer is permitted to write to members of the public about their legal rights, including their right to take appropriate advantage of the tax code. Moreover, although Rule 8.4(c) prohibits a lawyer from engaging in conduct that involves dishonesty, fraud, deceit, or misrepresentation, the Rules do not prohibit an attorney from offering his or her services to the public or from providing contact information toward that end. Thus, the title page is proper and choice (A) is correct.

Answer to Question 36

(B) - Under Rule 7.5(c), “[t]he name of a lawyer holding public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.” Thus Beta’s name must be removed because the facts state that Beta will not be allowed to practice law outside of Beta’s U.N. position, and two years is a “substantial period” of time.

Continuing to use the name of a deceased partner was permissible under the old Code (DR 2-102[B]) and now impliedly is permissible under Rule 7.5(a), because the continued use of a deceased partner’s name does not constitute a false or misleading representation of the lawyer or the lawyer’s services. *Rule 7.1.* Thus, Alpha’s name could remain in the law firm’s title even though Alpha is deceased. Thus, choice (B) is correct, and choices (A), (C), and (D) are incorrect.

Answer to Question 37

(D) - This question is presented as an unauthorized practice of law question, but there was no unauthorized practice because the attorney was physically located in East Dakota, where the attorney was admitted, when the attorney gave the advice. While they should advise such a client that they are not admitted to practice in jurisdictions in which they are not admitted, attorneys properly may, if sufficiently competent to do so, advise on the law of another jurisdiction, and even fax legal advice into that jurisdiction, even if they are not admitted there. What Rule 5.5(a) prohibits is practicing law from *within* a jurisdiction in which the lawyer is not admitted. Thus, since the attorney was not within West Carolina when the attorney gave the competent legal advice, choice (D) is correct and choice (A) is not. Choices (B) and (C) are not relevant to the inquiry of whether or not the attorney is subject to discipline here.

Answer to Question 38

(B) - Rule 5.4(a)(3) states that a law firm shall not share legal fees with a nonlawyer. The exception to this rule is that a nonlawyer employee (e.g., an office secretary, paralegal, or office administrator) may participate in a compensation plan (e.g., year-end bonuses) or retirement plan, even though the plan is based on a profit-sharing arrangement funded by legal fees earned by the law firm. *A.B.A. Informal Op. 1440 (1979); A.B.A. Formal Op. 325 (1970).* Thus, choice (B) is

better than choice (A). Although it is a correct statement of an ethical rule, choice (D) is incorrect based on the exception outlined above. Choice (C) is incorrect because there is no such ethical rule.

Answer to Question 39

(D) - The United States Supreme Court has held that, absent a substantial interest, content-based regulation of truthful and non-misleading lawyer advertising is unconstitutional. Thus, Rule 7.2 states that “[s]ubject to the requirements of Rule 7.1 [prohibiting false or misleading statements about the lawyer or the lawyer’s services] and 7.3 [face-to-face solicitation of prospective clients], a lawyer may advertise services through written, recorded or electronic communication, including public media.” Thus, lawyers may properly advertise the schools they attended and the degrees they obtained, their membership in bar associations, their foreign language abilities, and whether they accept credit cards.

In *Matter of R.M.J.*, 455 U.S. 191 (1982), the United States Supreme Court held that listing areas of practice is not misleading. Accordingly, Rule 7.4 recognizes that many lawyers have limited their practices to certain fields in the law, and therefore permits a lawyer to list only those areas in which the lawyer practices. Thus, the attorney’s advertisement is wholly proper, and choice (D) is correct.

Answer to Question 40

(A) While the CJC prohibits a sitting judge (or a candidate seeking judicial appointment) from engaging in a variety of activities including making contributions to a political organization or a candidate for public office, making speeches on behalf of a political organization, and attending or purchasing tickets for dinners or other events sponsored by a political organization or a candidate for public office, the CJC permits such activities by judicial candidates in public elections (compare the prohibitions in CJC §4.1 with the allowances in CJC §4.2).

Sometimes, reading the CJC can be somewhat confusing. For example, Rule 4.1(A) provides “Except as permitted by law, or by Rules 4.2, 4.3 and 4.4, a judge or a judicial candidate shall not . . . (A)(4) . . . make a political contribution to a political organization or a candidate for public office.” Then, Rule 4.2(B)(6) turns around and states “A candidate *for elective office* may . . . contribute to a political organization or candidate for public office. . . .” Thus, the answer to Q40 should be choice (A).

Here, the judge is seeking re-election and facing opposition from several candidates, and the question asks us whether she can set up a committee to seek contributions to finance her election campaign (allowed under CJC Sections 4.2 (B)(1) and 4.4), contribute reasonable sums of money to other candidates (allowed under CJC Section 4.2 (B)(6)), and attend and speak at political gatherings (allowed under CJC Sections 4.2 (B)(2) and (4)). Since none of these activities are prohibited by a judicial candidate in a public election, (A) is the correct answer.

Note, that the CJC prohibits a judge from personally sending out letters soliciting

campaign contribution during her campaign, and that this prohibition does not violate a judge's First Amendment rights. *Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015).

Answer to Question 41

(D) - Under the “substantial relation test,” once the attorney-client relationship has terminated, the attorney is disqualified from subsequently representing new clients where the new matter is the same or substantially related to the matter in which the attorney represented the former client and the new representation would be “materially adverse” to the interests of the former client. *Rule 1.9(a)*. Here, by representing the widow, the attorney would be attacking work product previously undertaken on behalf of his former client.

Note also that an attorney is prohibited from acting as an advocate at a trial in which the attorney is likely to be a necessary witness. *Rule 3.7*. Here, the attorney's testimony as to the supervision of the will would, in all probability, be in conflict with the widow's position at trial.

On the retainer agreement issue, *Rule 1.2(a)* states, “[a] lawyer shall abide by a client's decision whether to accept an offer of settlement....” *Comment 8* to *Rule 1.2* provides, “[a]ll agreements concerning a lawyer's representation of a client must accord with the rules of Professional Conduct and other law.” *See, e.g., Rules 1.1* (competence), *1.8* (conflict of interest) and *5.6* (the lawyer restricting the right to practice law). “The duty of a lawyer to promptly inform the client of any settlement offer is excused if the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer.” *Rule 1.4 cmt. 2*. “Although a client may grant the lawyer express authority to settle, a retainer agreement that forbids the client from settling ... without the lawyer's consent may be found to be against public policy and impermissible under *Rule 1.2(a)*.” *Rule 1.2 annot. (2011)*. Thus, both the retainer agreement and the representation here, in and of themselves, are improper, and choice (D) is correct.

Answer to Question 42

(B) - *Rule 1.8(b)* states that a lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent after full disclosure by the attorney. This applies when information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. Here, the attorney's self-interest conflicted with his undivided duty of loyalty to his client. Thus, (B) is the correct choice.

Choices (C) and (D) are incorrect as they deal with keeping (not using) the confidences of a former client. *Rule 1.9(c)*. Choice (A) is not relevant to the ethical considerations tested here.

Answer to Question 43

(B) - When evidence that a lawyer knows to be false is to be offered at the trial by a person who is not the client, the lawyer must refuse to offer it, irrespective of the client's wishes. *Rule 3.3 cmt. 5*. Here, the attorney knows that the defendant committed the robbery because the

defendant confessed the same to the attorney. Thus, the attorney's presentment of alibi testimony would be in violation of Rule 3.3(a)(3). Hence, choice (B) is correct. Note that while defense counsel typically must inform the prosecutor in advance of trial of alibi witnesses, choice (B) is better than choice (D) because the warning would not cure the unethical use of false testimony.

Although an attorney cannot communicate with another party who is represented by counsel, this prohibition does not apply to witnesses. Rule 3.4(f) prohibits a lawyer from requesting that a witness refrain from voluntarily providing relevant information to another party unless that witness is a relative or employee of the attorney's client. Because permission from the prosecutor or court is not required, choices (A) and (C) are not correct.

Although an attorney cannot communicate with another party who is represented by counsel, this prohibition does not apply to witnesses. Rule 3.4(f) prohibits a lawyer from requesting that a witness refrain from voluntarily providing relevant information to another party unless that witness is a relative or employee of the attorney's client. Because permission from the prosecutor or court is not required, choices (A) and (C) are not correct.

Under Rule 3.4(a), prosecutors generally have been admonished for attempting to place prosecution witnesses off limits to defense attorneys. "We shall not tolerate the view that the government has some special right or privilege to control access to trial witnesses." *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966); *United States v. Hyatt*, 565 F.2d 229 (2d Cir. 1977).

Answer to Question 44

(A) - When a lawyer's fee is paid by the client with property and not money, the Rules consider this to be a business transaction rather than a simple fee payment. *Rule 1.8 cmt. 1*. A "business transaction" is one in which the lawyer is potentially in a position to make money at the client's expense.

Whenever a lawyer enters a business transaction with a client, Rule 1.8 mandates that the transaction be fully set forth in writing, the client be advised to seek independent counsel, the client's informed consent be contained in a writing signed by the client, and the transaction be fair and reasonable.

Here, the attorney's transaction with the client was done face-to-face with no time given for reflection. Moreover, nothing was reduced to writing, and the client was not advised by the attorney to seek independent advice before consummating the transaction. Thus, even if the transaction was fair and reasonable, the attorney is subject to discipline for violating the requirements of Rule 1.8. Thus, choice (A) is correct and choice (C) is incorrect.

Although Rule 1.8 prohibits a lawyer from acquiring a proprietary interest in the subject matter of the lawsuit, this rule does not prohibit a lawyer from collecting the fee from the spoils of the litigation. However, this is a "business transaction" with a client, requiring full adherence to Rule 1.8(a). Thus, choice (B) is incorrect.

Although choice (D) essentially is a correct statement, it ignores the precautions that must

be taken when negotiating the payment of a fee in property.

Answer to Question 45

(B) - The prosecution has a duty to disclose exculpatory evidence favorable to the accused that is material to guilt or punishment or that could be used by defense counsel to contradict a prosecution witnesses. *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963). In that regard, Rule 3.8(d) mandates that the prosecutor in a criminal case make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused, mitigate the offense, or lessen the punishment imposed.

The statement in the present example clearly is not material to the defendant's guilt or innocence. Likewise, the statement does not contradict any of the state trooper's intended testimony. Thus, the best choice in this problem is choice (B). Choice (A) is not the best choice because the trooper is merely a witness and not the prosecutor's client. Thus, there is no duty of loyalty or confidentiality. Choice (C) is incorrect because it is overly broad. Choice (D) is incorrect because the trooper's statement does not mitigate the charges against the defendant. Likewise, the statement does not tend to reduce the punishment of the accused.

Answer to Question 46

(B) - Rule 3.1 states that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Thus, the Rules prohibit an attorney from asserting a claim "unless there is a basis in law and fact for doing so that is not frivolous." The "frivolity" of a claim is measured by the reasonable belief of the attorney. *See Rule 3.1 cmt. 2*. Thus, choice (B) is correct.

Choice (C) is incorrect because Rule 3.1 Comment 2 states that an action is not necessarily frivolous "even though the lawyer believes that the client's position ultimately will not prevail."

Note that Federal Rules of Civil Procedure, Rule 11 provides that "[e]very pleading and other paper of a party represented by an attorney shall be signed [which] constitutes a certificate by him that he has read the pleading and [that] it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." The student taking the MPRE should know this rule and keep in mind that filing a suit solely to gain a perceived settlement advantage will not satisfy the "good faith" requirement. Thus, choice (A) is incorrect.

Answer to Question 47

(D) - Rule 3.8(f) provides "except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, [a prosecutor in a criminal case shall] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."

Under Rule 3.6(b)(7), however, a prosecutor may publicly state the identity, residence, occupation, and family status of the accused. Thus, statement II is proper. Rule 3.6(b)(1) also allows the prosecutor to publicly state the offense involved and Rule 3.6(2) permits public disclosure of information contained in a public record (the indictment). Thus, statement I is proper. Finally, statement III is proper because Rule 3.6(b)(6) allows a public warning of danger. Thus, choice (D) is the correct answer.

Answer to Question 48

(B) - A lawyer can provide adequate representation in a wholly new area of law through necessary study as long as it does not cause the client unreasonable expense or delay. A lawyer does not necessarily require special training or prior experience to handle an unfamiliar legal problem. Similarly, a newly admitted lawyer can be as competent as a practitioner with many years of experience. *Rule 1.1 cmt. 2*. Rule 6.2 further states that a lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause such as:

1. Representing the client is likely to result in a violation of the ethical rules;
2. Representing the client is likely to result in unreasonable financial burden, so great as to be unjust; or
3. The client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Thus, if the attorney can become competent to handle the matter, even though the attorney is unfamiliar with criminal law, the attorney may (and should) represent the defendant. Accordingly, choice (B) is correct and choice (D) is not. Choice (C) is a potentially attractive answer, however, there would be no violation of the Rules if the attorney could competently represent the defendant, but had a selfish motive (currying favor with the judge) for taking on the representation. Whether or not the attorney charges a fee is not relevant here, and, therefore, choice (A) is also incorrect.

Answer to Question 49

(C) - State courts have inherent power over requirements for admission, the practice of law, discipline, and disbarment. For example, a state can, but is not required to, require bar applicants to successfully pass the state's bar examination. Alternatively, a state may permit an attorney admitted and practicing in another jurisdiction to join the state's bar on motion. States also properly may require that bar applicants graduate from an accredited law school.

A state cannot, however, require that a bar applicant be a resident of the state. *See New Hampshire v. Piper*, 470 U.S. 274 (1985); *Virginia v. Friedman*, 487 U.S. 59 (1988). Such a requirement would violate the Privileges and Immunities Clause of the United States Constitution. Keep in mind also that the case of *In Re Griffiths*, 413 U.S. 717 (1973) struck down a requirement of U.S. citizenship to become an attorney. Thus, choice (C) is the best answer.

Many states, including New York, permissibly require a practicing lawyer to maintain a

bona fide law office within the state. *Neal v. Energy Transportation Group, Inc.* 296 A.D.2d 339 (1st Dep't 2002). Choice (B) is, therefore, incorrect.

Answer to Question 50

(B) - There is an affirmative duty to disclose unprivileged knowledge or information of professional incompetence of a lawyer or judge. Rule 8.3 mandates reporting only those ethical violations giving rise to a substantial question as to the honesty, trustworthiness, or fitness of a lawyer or judge. Here, Arno violated the Rules by failing to adequately prepare for a client's case and Arno should be reported to the proper authority because the conduct raises a substantial question as to Arno's fitness to practice law. *Rule 1.1*. Since Larry's information relates to Larry's representation of the plaintiff, it is deemed confidential, and thus, Larry must seek his client's consent before reporting the misconduct. *Rule 1.6(a)*. Thus, choice (B) is correct and choice (C) is not. Choice (A) is not correct because the appropriate disciplinary committee is where Larry's complaint should be directed.

Answer to Question 51

(A) - Here, the path to the correct answer is found in the difference between Rule 1.5(b) and 1.5(c). Rule 1.5(b) states that "[t]he scope of the representation and the basis of the fee and expenses for which the client will be responsible *shall* be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate." If this was all Rule 1.5 said about fees, then choices (C) and (D) would both be correct because the Rules do not mandate that the fee arrangement be in writing (although the Rules state it is "preferable"). When a lawyer regularly represents a client, he or she may have an understanding concerning fees and expenses for which the client is responsible.

However, the Rules specifically go further vis-a-vis contingent fees. Rule 1.5(c) states: "[a] contingent fee *shall* be in a writing signed by the client and *shall* state the method by which the fee is to be determined...." Even though the attorney has regularly represented the dentist, the contingency fee arrangement must be in writing, signed by the client. Thus, choice (B) and (C) are incorrect, and choice (A) is the best choice.

Answer to Question 52

(C) - The attorney-client privilege extends to communications between a client and an attorney's subordinate (e.g., the secretary) made in confidence for the purpose of obtaining legal service or legal advice from the attorney. *In re Leslie Fay Cos., Inc. Sec. Litig.*, 161 F.R.D. 274, 282 (S.D.N.Y. 1995).

The privilege is extended to communications with such nonlawyers only if:

- (1) the person asserting the privilege is or sought to become a client;
- (2) the person to whom the communication was made is a member of the bar or his or her subordinate;

- (3) the information was imparted outside the presence of strangers;
- (4) the information was not imparted for the purpose of committing a crime or fraud; and
- (5) the privilege being asserted was not waived by the client or the attorney. *United States v. Stewart*, 287 F. Supp. 2d 461, 464 (S.D.N.Y. 2003); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950).

Here, the client was seeking legal advice from the attorney via her subordinate, the secretary. He imparted his information confidentially to her and nothing in the facts indicated any waiver of the privilege. Accordingly, a court would be correct in striking down both subpoenas issued by the prosecutor. Thus, choice (C) is correct.

Note that if the client had burst into the attorney's office and blurted out this same information to the secretary in front of a waiting room full of the attorney's clients, the privilege would not apply because the communication would have been made in the presence of strangers (and not in confidence, as required). Under these different facts, choice (A) would be the correct answer. *People v. Mitchell*, 58 N.Y.2d 368, 375 (1983).

Answer to Question 53

(D) - In 2004, the A.B.A. Committee on Professional Conduct held that although there is no per se rule prohibiting a lawyer from posting a bond or pledging assets for a client currently represented by the attorney, such postings or pledges are proper only in those rare circumstances in which there is no significant risk that the attorney's representation of the client will be materially limited by his personal interest in recovering the amount advanced. *A.B.A. Formal Op. 04-432* (2004). The Committee noted that only in the rarest situation would the posting of bail by the lawyer be permissible. The Committee provided the following limitations:

- (1) The amount involved is negligible and of little or no consequence to the lawyer;
- (2) The lawyer is a friend of the family of the client and may expect the family to indemnify the attorney for any loss;
- (3) In the event the bond is forfeited, the lawyer will forego available legal recourse against the client; or
- (4) There is little or no risk that the client will fail to appear.

Three of these four factors were set forth in the facts to this question, thereby minimizing the risks that the attorney's legal representation of the son would be compromised by the attorney's desire to recover the posted bond. Thus, choice (D) is correct, not choice (A).

A lawyer who advances substantial funds or puts substantial assets at risk to secure a client's release on bail has a personal interest in avoiding financial loss if the client does not appear. Under Rule 1.7(a)(2), a lawyer shall not represent a client if a concurrent conflict exists creating a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's personal interest. Notwithstanding a conflict, the lawyer may nevertheless represent the client if the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation, the representation is not prohibited by law, and the client gives informed consent confirmed in writing. *Rule 1.7(b)*.

Rule 1.8(e) further provides that a lawyer shall not provide financial assistance to a client in connection with a pending or contemplated litigation except that a lawyer may advance court costs and the expense of litigation. The Committee believed, as do a substantial number of other ethics committees, that advancing funds for the cost of a client's bond or bail may be legitimately viewed as a cost of litigation. Thus, choice (B) is incorrect.

Answer to Question 54

(A) - Rule 8.3(a) states that a lawyer who has knowledge (not rumor or suspicion) that another lawyer's conduct has violated the Rules in a way that "raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer" must inform the appropriate disciplinary authority. Bravo's failure to withdraw, as required by Rule 1.16(a)(2), from representing Defco while she suffers from a condition materially impairing her ability of practice, raises a substantial question as to Bravo's fitness as a lawyer, thus requiring reporting by Alpha under Rule 8.3(a).

Note that a lawyer is not required to act on rumors or conflicting reports about another lawyer. Moreover, knowledge that another lawyer is drinking heavily, or is evidencing impairment in a social setting (lawyers have been found to suffer from alcoholism and substance abuse at a rate at least twice as high as the general population (*A.B.A. Formal Op. 03-431 (2003) at n.1*)), is not itself enough to trigger a duty to report under Rule 8.3. A lawyer must *know* that the condition is materially impairing the affected lawyer's representation of clients.

A.B.A. Formal Opinion 03-431 (2003) states that when faced with Attorney Alpha's dilemma, Alpha "may" or "should" (but not "must") consult with Bravo's partners or supervising lawyer if Bravo is practicing within a firm. Thus, choice (C) is not the best answer.

Alpha also might consider contacting an established lawyer assistance program or speaking with Bravo about Alpha's concerns. The A.B.A. also said that Alpha might consult with experienced medical personnel who are experts in treating substance abuse or addiction. "Nevertheless, such a report [or consultation] is not a substitute for reporting to a disciplinary authority with the responsibility for assessing a lawyer's fitness to practice in the jurisdiction." *Id.* Thus, choice (B) is not the best answer.

Answer to Question 55

(C) - Rule 7.3(a) states that "a lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer doing so is the lawyer's pecuniary gain." Likewise, lawyers may not use other people to solicit for them. *See Rule 7.2(b)* (prohibiting a lawyer from paying another to recommend the lawyer's services) and *Rule 8.4(b)* (prohibiting a lawyer from violating or attempting to violate the ethics rules through the acts of another).

However, choice (B) is not the correct choice in this question because Rule 7.3(d) permits a

lawyer to participate in a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer, and the Rules allow the plan to use in-person or telephone contact to solicit membership or subscribers for the plan from persons who are not known to need legal services in a particular matter covered by the plan. Thus, choice (C) is correct, not choice (A) or (D).

Answer to Question 56

(B) - Rule 1.8(f) states that a lawyer shall not accept compensation from a third person for representing a client (Jason) unless 1) the client gives informed consent and 2) there is no potential conflict of interest that may interfere with the lawyer's judgment. Such conflict often arises where the fee payment is made by a third person whose interests may be adverse to those of the client. Here, a conflict arises because Bailey's ability to negotiate a deal with the prosecution is impaired in that it may require Jason to testify against his employer, Jill (who is paying Bailey's fee), in exchange for a reduced charge or a lenient sentence. Thus, choice (B) is correct. Note that while choice (D) is correct, it is not the best answer.

Rule 5.4(c) also comes into play here. It prohibits a lawyer from permitting a person who recommends, employs, or pays the lawyer to direct or regulate the lawyer's professional judgment. Finally, the arrangement also runs afoul of Rule 1.7(a)(2), which proscribes representation that could materially limit the lawyer's loyalty and responsibility to another client. The Supreme Court in *Wood v. Georgia*, 450 U.S. 261 (1981), a 14th Amendment Due Process case, analogized that "it is inherently wrong to represent both the employer and employee if the employee's interest may, and the public interest will, be advanced by the employee's disclosure of his employer's criminal conduct. For the same reasons, it is also inherently wrong for an attorney who represents only the employee to accept a promise of pay from another person whose criminal liability may turn on the employee's testimony."

Answer to Question 57

(C) - Although Rule 8.4(b) prohibits a lawyer from violating or attempting to violate the Rules through the acts of another, no ethical violation occurred here because the Rules do not prohibit communication with a person known to be represented by a lawyer in the course of social, business, or other relationships concerning matters that do not relate to the matter involved in the representation. Thus, Bravo did not violate or attempt to violate any ethical rule. Choice (C) is correct and choice (A), (B) and (D) are incorrect.

Answer to Question 58

(A) - A liability insurance policy promises to pay on behalf of the insured any amount for which the insured is liable on claims falling within the policy's coverage. Additionally, the insurance company assumes the duty to provide a lawyer and the cost thereof to defend the insured against such a claim. The insured, in turn, by entering into the insurance contract, gives the company considerable control over the direction of the defense and any settlement of the matter.

Historically, most insurance defense lawyers practice in private law firms, but many are staff attorneys employed by insurance companies. Absent a conflict of interest, the lawyer may represent not only the insured, but the insurance company as well. “[T]he determination of when and to whom the client-lawyer relationship attaches is a matter of state [contract] law and not governed by the rules of professional responsibility. However, once the client-lawyer relationship attaches, the rules of professional responsibility, not the insurance contract or the lawyer’s employer, govern the lawyer’s ethical obligations to the client.” *A.B.A. Formal Op. 03-430 (2003)*. Thus, choice (D) is not correct.

Many jurisdictions have adopted this “dual client” rule in which both the insured and the insurance company are the lawyer’s clients, whereas other jurisdictions have adopted a “single client” rule in which the lawyer’s sole client is the insured (e.g., New York). In either event, the analysis and conclusion of this problem are equally applicable to both. Informed consent of both clients is critical. Hence, choice (A) is the best answer and choice (C) is incorrect.

Conflicts between the insured and insurer rarely develop even though, under the parties’ insurance contract, the insurance company largely calls the shots in the defense of claim. Both typically are interested in disposing of the case on the best possible terms and there is no reason why the same lawyer may not represent both interests. Indeed, “[i]n the great majority of liability cases, the interests of the insured and their insurance company do not collide”; in fact, usually insurer and insured are parties united in interest and “financially aligned.” *Id. at n.13, 19 and 20*.

Choice (B) is not the best answer because a lawyer’s duty of confidentiality to each client remains plenary. “[I]f a conflict of interest between the insurer company and the insured does arise in the course of the representation, the lawyer immediately must resolve it by either obtaining the insured’s informed consent or terminating the representation.” *Id.*

Answer to Question 59

(D) - Rule 1.2(c) states that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

Comment 7 to Rule 1.2(c) states that “[a]lthough an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” *See also Rule 1.1*.

Clearly, knowledge of well settled legal principles such as the statute of limitations is expected from a lawyer providing competent advice. *Rule 1.1 annot. (2011)*. While discussing the duty owed to a prospective client, the Restatement notes that when a prospective client and lawyer discuss the possibility of representation, the lawyer might comment on such matters as the time within which action must be taken. *Restatement (Third) of the Law Governing Lawyers § 15 cmt. e; see also Miller v. Metzinger, 154 Cal. Rptr. 22, 28 (Cal. Ct. App. 1979)* (holding that a lawyer who advises a potential client must mention the impending expiration of the statute of limitations). Thus, choice (B) is not correct.

Here the attorney failed by not obtaining “informed consent” from the client to permit the attorney to limit the scope of the representation. The attorney was required to clearly explain limitations to the client. As Rule 1.0(e) (Terminology) notes, informed consent is a client’s consent “after the lawyer has communicated adequate information and explanation about the material risks and reasonable available alternatives to the proposed course of conduct.” Comment 6 to Rule 1.0 states that it requires an “explanation reasonably necessary to inform the client ... of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s ... options and alternatives.” The facts of this question do not contain reference to any such explanation or discussion, and, thus, choice (D) is correct, not choice (A).

Answer to Question 60

(C) - Rule 5.6(a) states that a lawyer shall not participate in offering or making a partnership or employment agreement that restricts the right of a lawyer to freely practice law after termination of the relationship. Provision II clearly contravenes this rule as it restricts Alpha’s right to represent Bravo’s clients and restricts Bravo’s clients from freely choosing Alpha as their attorney. Thus, provision II subjects both Alpha and Bravo to discipline.

Rule 5.6(a) and Restatement (Third) of the Law Governing Lawyers § 13(1) (2000), permit restrictive covenants on future legal employment to be imposed as a condition to law firm’s obligation to pay retirement benefits to one of its lawyers. If the lawyer is truly retiring from the practice of law, then such a restriction on her right to practice will not interfere with rights of firm clients to choose her as a lawyer because her legal services are no longer a viable option. Thus, provision III will not subject Alpha or Bravo to discipline. *Rule 5.6 annot. (2011).*

Although there are restrictions on fee sharing between lawyers in different firms (*Rule 1.5(e)*), if the lawyers are in the same firm, as are Alpha and Bravo in this problem, the Rules do not dictate how such fees must be divided or distributed among such lawyers. Because Alpha and Bravo are in the same firm, they need not consult the Rules when determining how the legal fees they earn will be shared. Thus, provision I would not subject the attorneys to discipline, and choice (C) is the best answer.

PIEPER

**MULTISTATE
PROFESSIONAL
RESPONSIBILITY
EXAM II**

You have two hours and five minutes to complete the following sixty simulated MPRE questions.

EXAM INSTRUCTIONS

The following practice exam consists of sixty (60) multiple choice questions for which you have two hours and five minutes to complete. Though some questions may take you longer than others, the exam allots you an average of two and a half minutes per question. Manage your time carefully. If you spend too much time on one or more challenging questions, you may have difficulty completing the exam.

A brief factual scenario precedes each question. Read each scenario and the words of the question carefully. Then, evaluate the four answer choices provided. You should select the *best* answer from the choices provided.

All of your selected answers should be based on your knowledge of the disciplinary rules of professional conduct currently articulated in the American Bar Association (ABA) Model Rules of Professional Conduct, the ABA Model Code of Judicial Conduct, controlling constitutional decisions, generally accepted principles established in leading federal and state cases, and in procedural and evidentiary rules. To the extent that questions of professional responsibility arise in the context of procedural or evidentiary issues, such as the availability of litigation sanctions or the scope of the attorney-client evidentiary privilege, the Federal Rules of Civil Procedure and the Federal Rules of Evidence will be assumed to apply, unless otherwise stated. This exam is not meant to test your personal ethical beliefs and values.

Record each of your answers on one of the answer sheets provided on the page following this exam. You will receive no credit for any answers or other markings made in the exam booklet. You will only receive credit for correct answers marked on your answer sheet. You will not be given any additional time to transcribe any of your answers from the exam booklet to your answer sheet.

If you do not know the answer to a question, you should choose an answer at random (guess) and record that answer on your answer sheet. Your score is based on your total number of correct answers, and there is no penalty for incorrect answers. Guessing when you do not know an answer will not hurt your score and may actually improve it, so record an answer for each of the sixty questions.

You may only select one answer choice on your answer sheet. If two answer choices are marked you will receive no credit, even if one of your choices was the correct answer.

Question 1.

After submitting briefs to the court on a contested motion in a multi-party suit and while awaiting an order, an attorney read a recent decision by the highest court in the relevant jurisdiction that directly contradicted the position she took in her brief. The attorney, without consulting her client, immediately notified the court of the recent appellate decision.

Was the attorney's conduct proper?

- (A) Yes, if she also notified all of the parties adversely affected by the recent decision.
- (B) Yes, if she also notified those parties submitting papers opposing the attorney's brief.
- (C) Yes, if she also notified all parties in the lawsuit.
- (D) Yes, and she may leave party notification to the discretion of the court.

Question 2.

An employer contacted an attorney whom he had met at a business luncheon, to inquire whether the employer had a cause of action against one of his employees. The employer was upset that the employee worked as a landscaper on weekends for one of the employer's competitors. The employer believed that there must be a penal law prohibiting such divided loyalty.

The attorney, who was newly admitted and had not handled any employment matters, was eager to please the employer. The attorney hoped that if he stopped the employee from working for the employer's competitor, the employer would shift all of his legal work to the attorney's firm.

Knowing that there is no penal law prohibiting the employee's weekend work, the attorney nonetheless told the employer that his instincts were correct and that the employee's actions were illegal. He then sent a letter to the employee threatening to bring the matter to the district attorney's attention for potential criminal prosecution.

Is the attorney subject to discipline?

- (A) Yes, because the criminal claim was not well-founded.
- (B) Yes, because attorneys cannot threaten criminal actions.
- (C) No, because the employer may have a civil claim against the employee.
- (D) No, because the attorney was zealously representing his client.

Question 3.

An attorney was a partner in a prominent law firm and the Chairman of the Ways and Means Committee in the State Legislature. The Committee is currently considering, and must decide, whether to permit gambling in the state.

The attorney represents Hutton Hotels and assisted it in purchasing large tracts of real estate in C City, the site of the proposed gambling center. Prior to the vote regarding gambling in C City, the attorney fully informed Hutton's board of directors that his representation of the hotel would in no way influence his thinking as a legislator and that it was very possible that he would vote against the bill. The chair of Hutton's board said she fully understood, and the board still wanted the attorney's expertise as a real estate lawyer. The hotel signed a written consent to the attorney's dual role, and the attorney continued representing Hutton in the hotel's real estate transactions.

Is it proper for the attorney to represent Hutton?

- (A) Yes, if the attorney can truly separate his work for Hutton from his work for the State Legislature.
- (B) Yes, but he should refer the matter to an associate in his firm and elect not to share in any fees collected from Hutton.
- (C) No, and he must cease representing Hutton.
- (D) No, and he must refer the matter to another competent lawyer and receive only a forwarding fee.

Question 4.

Watts LLC is one of the few firms in the country to specialize exclusively in environmental law. Its expertise is unequalled. Whenever a new associate joins the firm, the firm spends close to 200 hours tutoring the new associate. The associate is made to read environmental regulations and the firm's confidential memoranda of law in order to achieve the degree of expertise necessary to represent the firm's clients.

Having just graduated from a prestigious law school, Wanda was offered a job with Watts LLC at a starting salary of \$160,000. As part of her employment contract, Wanda agreed that, in the event she leaves the firm within three years, she would not communicate with any of the firm's clients or practice environmental law within New York City.

Is Watts LLC or Wanda subject to discipline?

- (A) Only Watts is subject to discipline for trying to limit Wanda's communication with firm clients.
- (B) Only Watts is subject to discipline for trying to limit Wanda's geographic area of practice.
- (C) Only Watts is subject to discipline for both trying to limit Wanda's communication with firm clients and her geographic area of practice.
- (D) Both Watts and Wanda are subject to discipline for both trying to limit Wanda's communication with firm clients and her geographic area of practice.

Question 5.

An attorney represented a wealthy builder who converts rental apartments to occupant-owned cooperatives. After a lengthy battle to convert a large apartment house to a cooperative apartment in Metropolitan City, the builder arrived at the attorney's office with two checks. The first check was payable to the attorney's firm in full satisfaction of the firm's legal bill. The second check was for \$50,000, payable to the attorney as a gift.

If the attorney accepts both, is he subject to discipline?

- (A) Yes, because the attorney accepted a large gift from a non-family member.
- (B) Yes, as is the builder, because the value of the gift was disproportionate to the value of the services.
- (C) No, but the builder is subject to discipline because she is guilty of commercial bribery.
- (D) No, because the attorney did not suggest or solicit the gift.

Question 6.

A client owns an adult book store that sells magazines featuring nude people. The store also contains booths that show pornographic films. It is located within 200 feet of an elementary school.

A local law prohibits such establishments from operating within a 300-foot radius of a school, and the local building department issued a citation to the client ordering him to cease operations.

The client consulted an attorney. The attorney believed that the statute was unconstitutional as it applied to the bookstore. Accordingly, the attorney agreed to commence an action in the appropriate court to challenge the constitutionality of the statute. The attorney also advised the client that the client could either ignore or abide by the building department's order while the action was pending.

Is the attorney's advice proper?

- (A) Yes, because he has a good faith belief in the client's constitutional argument.
- (B) Yes, because the order is not from a court.
- (C) No, because he is instructing the client to commit a crime.
- (D) No, because he is instructing the client to disobey an order.

Question 7.

A prosecutor recently obtained an indictment against Jim, a school gym teacher, for sexually molesting a teenage student at the school.

As the prosecutor was leaving the courthouse following a hearing unrelated to the molestation matter, a television reporter stopped the prosecutor and asked him if he would comment on Jim's pending prosecution.

The prosecutor told the reporter that "Jim has been indicted for sexual assault in the first degree." He then pulled out a copy of the two-page indictment and read it.

The prosecutor also stated that "Jim is reported to have done this to at least ten other teenage students." The reporter then asked the prosecutor to speculate on how long Jim might be incarcerated, and the prosecutor replied, "if convicted, he faces up to 50 years in jail."

Were the prosecutor's comments proper?

- (A) Yes, because they merely inform the public about the offense involved.
- (B) Yes, because they are all statements of undisputed fact.
- (C) No, because the comments about the reports of his prior illegal conduct may prejudice potential jurors.
- (D) No, because a lawyer should not speculate as to potential criminal punishment.

Question 8.

A judge and her younger brother both live in the same community. The judge has sat in the criminal court for 11 years, while her brother, who passed the bar exam three years ago, is in private practice earning substantially more money than the judge.

The judge's son, who has a psychiatric disorder, is in need of a private school education, and the judge's husband wants to go back to school to earn a college degree.

On Thanksgiving, the judge's brother told her that he just received a substantial contingent fee in a negligence case and is "rolling in bucks." The judge asked her brother for an interest-free, unsecured, substantial loan, and her brother agreed to lend her the money.

Is the judge's conduct proper?

- (A) No, because the loan was given on a special occasion.
- (B) No, because the gift of a substantial interest-free loan involves more than ordinary hospitality.
- (C) Yes, because the loan does not interfere with the judge's performance of judicial duties.
- (D) Yes, because the brother is not likely to come before the judge in court.

Question 9.

An attorney worked for the state as an assistant attorney general in the civil division. In the course of a criminal investigation, the District Attorney's office received information from a criminal defendant that the defendant had sold marijuana to the attorney on more than 50 different occasions.

When the attorney was confronted with the evidence, he admitted that it was true, but honestly swore that his drug use never interfered with his professional duties. He pled guilty to the misdemeanor of unlawful possession of marijuana.

Is the attorney subject to discipline?

- (A) Yes, because he is guilty of a misdemeanor.
- (B) Yes, because he repeatedly violated the law.
- (C) No, because he did not use marijuana while he was working and his personal use did not affect his performance on the job.
- (D) Yes, because he was a government employee.

Question 10.

During a ten-day civil jury trial, an attorney noticed that the judge repeatedly fell asleep on the bench, especially after lunch. On several occasions, the attorney asked to approach the bench to inquire as to whether the judge was ill. More often than not, the judge would scold the attorney and order him to sit down and continue with the trial. The judge even threatened the attorney with contempt of court.

Eventually, the attorney learned that it was a common joke around the courthouse that the judge would sleep during trials until someone hollered "objection" to rouse the judge.

What is the proper course of action for the attorney to take?

- (A) Approach the judge alone in chambers and request that he see a doctor.
- (B) Say nothing unless the case goes against his client, at which time he can raise judge's conduct in a request for a new trial.
- (C) Contact the proper judicial disciplinary body and other parties to advise them of the situation.
- (D) Notify the local newspaper of how taxpayer money is being spent.

Question 11.

An attorney represented a class of plaintiffs injured by a medical device designed, manufactured, and widely distributed by a pharmaceutical company. At trial, the attorney intends to call a total of 27 lay and expert witnesses.

The attorney made various compensation arrangements with each witness depending on the location from which the witness was traveling and the time the witness was spending to prepare for and testify at trial. In that regard, he agreed to reimburse each witness for his or her airfare, hotel, meals, and reasonable lost wages.

With respect to the expert witnesses, the attorney, who firmly believes that his case will prevail if the jury simply understands the intricate medical issues, has agreed to pay them a bonus if his case wins. Attempting to ensure that they are well prepared without inviting accusations that he paid for favorable testimony, the attorney agreed to pay the bonus even if their testimony is unfavorable.

Is the attorney subject to discipline?

- (A) Yes, because a lawyer may only reimburse a witness for travel, lodging, and meal expenses.
- (B) Yes, because agreeing to pay a bonus to witnesses upon a successful verdict is prohibited.
- (C) No, because the compensation to the fact witnesses is reasonable and the bonus will not influence the experts' testimony.
- (D) No, because a lawyer must pay what a witness requires in exchange for the inconvenience of testifying at trial.

Question 12.

After a heavily contested negligence and wrongful death case in which an attorney represented the estate of the deceased plaintiff, the jury returned a verdict in favor of the defendant. Surprised, the attorney set out to locate the foreman of the jury. Once he found the foreman, the attorney called her to see if she would be opposed to speaking with him. The foreman had no objections and the attorney asked her the following questions:

- I Did any of the jurors visit the accident scene during the trial?
- II Was there any misconduct committed by the jury?
- III On what basis did the jury return the verdict favorable to the defendant?

The foreman answered the first two questions in the negative and also stated that the jury ruled in favor of the defendant because they found the defendant's expert to be more convincing. The law of the appropriate jurisdiction permits lawyers to communicate with discharged jurors.

Was the attorney's conduct proper?

- (A) Yes, because no law in the jurisdiction prohibits a lawyer from communicating with a discharged juror.
- (B) Yes, because part of a juror's duty is to assist counsel in determining whether he or she has grounds for an appeal.
- (C) No, unless he first suggested to the foreman that she consult counsel.
- (D) No, because the Model Rules do not permit a lawyer to question a juror about the jury's basis for its verdict.

Question 13.

While a wealthy basketball player was on a 10-day road trip, the water pipes in his house burst when the boiler stopped functioning. The water caused substantial damage to the house. The basketball player notified his insurance company, but the company declined to pay the damage because the house was vacant when the accident occurred. The basketball player retained an attorney who specializes in insurance coverage litigation to fight the insurance company's decision.

The attorney believed that the insurance company's liability was clear, that some recovery was certain, and that as soon as he started the action, the insurance company would settle. The attorney and the basketball player agreed to a contingency fee arrangement whereby the attorney would earn one-third of any recovery.

Is the fee arrangement proper?

- (A) No, because contingent fees are available only in personal injury cases.
- (B) No, because contingent fee arrangements are not available to people who can afford to pay a fee.
- (C) Yes, because contingent fees are available in all cases.
- (D) Yes, if the basketball player understands how the fee is to be calculated and signs a writing setting forth the terms.

Question 14.

An attorney agreed to represent a criminal defendant. The defendant's parents gave the attorney \$1,000 for bail and a \$300 retainer for his legal fees at \$75 an hour. The attorney put the \$1,300 into his escrow account.

The judge refused to release defendant on bail and the parents fired the attorney. They were very unhappy with the attorney's results and demanded the return of the full \$1,300. The attorney worked three hours on the matter.

What is the proper course of action for the attorney to take?

- (A) Continue to hold the \$1,300 in escrow until the fee dispute is resolved.
- (B) Refund \$1,000 and take \$300 for himself.
- (C) Refund \$1,075 and take \$225 for himself.
- (D) Refund \$1,075 and keep \$225 in escrow.

Question 15.

Approximately 100 guests were present at the high school graduation celebration for an attorney's 18-year-old daughter. Lilli, one of the guests, currently is serving as a juror in the midst of an antitrust case. Attorney Norman, another guest at the celebration, is not involved in the suit, but is a member of the firm representing one of the parties at the trial. Attorney Carl, a sole practitioner and also a guest at the celebration, is in no way involved in the antitrust case. Indeed, Attorney Carl's practice exclusively involves marital law issues.

Is it proper for Lilli to discuss the antitrust trial at the party?

- (A) Yes, but with Attorney Norman only.
- (B) Yes, but with Attorney Carl only.
- (C) No, not with either.
- (D) No, unless Lilli speaks in hypotheticals without revealing any privileged trial testimony.

Question 16.

Airco operates a multi-million dollar nuclear power plant in C City. For over three decades, the plant has relied on a river that runs past the plant and through C City to cool the plant's power-generating turbines.

In the past year, a great amount of media attention has been devoted to statistics showing that an unusually high number of C City residents suffer from a rare nervous system disorder linked to radiation exposure. C City's residents and local politicians are outraged, and a class action lawsuit has been started against Airco. The plaintiffs, alleging various bodily injury and property damage claims, believe that Airco's operations emitted radiation into C City's water system, causing them injury.

Airco has become very unpopular in C City, and, therefore, is unable to obtain a local lawyer to handle its defense. Upon Airco's application, the court appointed an attorney to defend Airco.

It is proper for the attorney to refuse the case?

- (A) Yes, if Airco's acts are so repugnant to her that her attorney-client relationship is likely to be impaired.
- (B) Yes, if the attorney has a neighbor who is serving as a named plaintiff in the class action.
- (C) No, if she no longer wishes to defend class action lawsuits.
- (D) No, if she fears that Airco may become insolvent as a result of the suit and be unable to pay her fee.

Question 17.

Scabby Arms is the largest and notoriously most aggressive law firm in the country. It specializes in mergers and acquisitions, and it is widely considered the preeminent firm in that area. When a company decides to buy out or take over another, that company's first call is often to Scabby Arms.

Johnston & Johnston (J&J) is a large pharmaceutical company. It identified a much smaller biotech firm as a target for a hostile takeover. Last week, J&J's CEO secretly met with a partner of Scabby Arms to discuss retaining the firm. The partner explained that the firm's fee would be considerably higher than the fee charged by another firm in the area because of Scabby Arms's superior skill and expertise, and because conflicts likely will arise from working on this deal that will preclude Scabby Arms from accepting other employment on several potential deals.

Is the higher fee proper?

- (A) Yes, but only if it is based on the firm's higher skill and reputation for excellence in mergers and acquisitions.
- (B) Yes, for both of the partner's stated reasons.
- (C) No, because it is not commensurate with fees charged by other firms for the same work.
- (D) No, because it is unreasonable.

Question 18.

An attorney was approached by a businessman. The businessman said that his neighbor's son plays his stereo so loudly that it is disturbing the businessman's wife. The businessman complained to his neighbor, to no avail.

The businessman has no intention of suing his neighbors because he does not want to incur the costs associated with going to court and he wants to avoid any publicity. However, the businessman hopes that he might solve the problem if the attorney sends a letter to his neighbors threatening a lawsuit.

Would the attorney be subject to discipline for sending the letter?

- (A) Yes, but only if the attorney acts with malice.
- (B) Yes, because the attorney is engaging in a misrepresentation and deceit.
- (C) No, if the businessman believes that grounds exist for bringing a valid suit.
- (D) No, unless the neighbor's son suffers damages in reliance on the fraudulent misrepresentation.

Question 19.

An attorney has been in practice now for several years. When he first opened his practice, the volume of his business was low, and he kept very careful and tidy records of his office expenditures and his client's accounts.

More recently, the attorney's practice has begun to grow, but not yet to the point where he can afford to hire a secretary. Consequently, his office and client accounts are now in disarray. When settlement and fee checks pile up on his desk, he has taken to signing them and depositing them all in his IOLTA account for safe keeping. The attorney knows that he may not shortchange that account, so he figures it best to overfund it with his personal funds until he has a chance from time to time to balance out the account. To date, he has not drawn any funds from the account except for the purpose for which those funds were deposited.

Is the attorney subject to discipline?

- (A) Yes, because the attorney must have a separate escrow account for each client's funds.
- (B) Yes, because the attorney commingled his personal funds with his escrow account.
- (C) No, because the attorney never misappropriated any of the funds for his personal use.
- (D) No, because the attorney never misappropriated the funds for the benefit of another client not entitled to those funds.

Question 20.

Alpha passed the bar exam and is now applying for admission to the bar. His friend, Beta, is a newly admitted attorney, who just started a law practice. Alpha, who has known Beta since childhood, asked Beta to be one of his character references. Beta, happy and proud that Alpha asked her, filed a glowing recommendation with the character committee.

After submitting the recommendation, Beta learned that Alpha was arrested in college for the sale of drugs, a fact that Alpha does not plan to disclose to the character committee. Beta knows that Alpha has put the incident in his past and will never repeat it. For that reason, she feels comfortable with her recommendation and decides to leave it as it stands.

Is Beta subject to discipline?

- (A) Yes, because she made a misrepresentation to the character committee.
- (B) Yes, because she has a continuing obligation to be truthful in her submissions to the character committee.
- (C) No, because her letter contained no misrepresentations of fact.
- (D) No, because her letter, in good faith, contained facts known to her at the time.

Question 21.

An engineer worked for I.B.R. for 17 years. During those years, he worked exclusively in the design department, where he applied for and obtained hundreds of patents for use in I.B.R. products

After he retired, I.B.R. discontinued paying to the engineer certain patent royalties; the company's new in-house counsel took the position that the patents belonged to I.B.R. as the engineer's employer at the time of their filing.

The engineer retained an attorney to sue I.B.R. for patent infringement. The engineer and the attorney agreed in writing to a contingent fee arrangement. The attorney filed suit and then began working exclusively on the engineer's case.

Just before the trial, the engineer abruptly fired the attorney without explanation and hired new counsel. After several calls to the engineer went unanswered, the attorney filed a retaining lien on the engineer's file to secure payment of her fee.

Is the attorney subject to discipline?

- (A) Yes, because the client is entitled to return of the client's file immediately upon the lawyer's discharge.
- (B) Yes, because a lawyer may not file a lien on a client's property.
- (C) No, if she first offered the engineer the option of arbitrating the fee dispute.
- (D) No, because the attorney's actions were proper.

Question 22.

After a successful run for re-election in a hotly contested judicial election, a judge resumed her judicial functions. She also remained politically active within her local political party because her term is for only four years, meaning that her next election is never far away.

This month, the judge's political party is holding a rally to raise money for its candidates for the upcoming election. The judge purchased a ticket to the rally and plans to attend.

Is the judge subject to discipline?

- (A) Yes, because a judge cannot be affiliated with a political party when the judge is not actively seeking re-election.
- (B) Yes, because by attending the rally, the judge will undermine the public perception of the impartiality of the bench.
- (C) No, because the judge will attend the rally in her capacity as member of a political organization, not as a judge.
- (D) No, because judges may make contributions to, and attend the rallies of, political organizations.

Question 23.

Last week's newspaper announced that Attorney O'Malley was being seriously considered for appointment to the bench by the state governor. Attorney DiPaolo is aware that several years ago O'Malley was charged in another jurisdiction for suborning perjury, and more recently was divorced by his wife because of an adulterous affair.

Attorney DiPaolo is friendly with O'Malley and believes O'Malley would make a terrific judge. While he considered raising the charge of perjury and the affair with the newspaper, Attorney DiPaolo decided that it was in everyone's best interest that he remain silent.

Is Attorney DiPaolo's silence proper?

- (A) No, because he is obligated to disclose his knowledge of O'Malley's dishonesty.
- (B) No, because he is required to disclose knowledge of adultery as it bears negatively on O'Malley's character.
- (C) Yes, because both issues are of public record.
- (D) Yes, because neither issue reflects on O'Malley's fitness for service on the bench.

Question 24.

A labor attorney was an expert on coal mining safety. For a two-year period more than 10 years ago, she represented the Coal Miners' Union in a suit to compel mine owners to negotiate in good faith under a collective bargaining agreement. During that period, she wrote several law review articles on mine safety.

The attorney has now been retained by the Coal Mine Owners' Association to speak at a legislative committee hearing in opposition to federal regulations promoting coal mining safety.

Is it ethically proper for the attorney to testify against the proposed coal mining safety regulations?

- (A) Yes, because she has not recently represented an adverse client in the area.
- (B) Yes, if the matter is not the same or a substantially related matter in which she represented the Coal Miners' Union.
- (C) No, because testifying would require her to disclose confidences and secrets she obtained while representing the Coal Miners' Union.
- (D) No, because her testimony will conflict with the interests of her former client.

Question 25.

A wealthy condominium developer retained a law school professor to serve as an adviser to his corporation. Because of the professor's strong background in taxation and real estate law, she will not be required to conduct much legal research.

In determining what to charge for her services, the professor takes into consideration her experience and specialization in the field, what other attorneys in the area charge for similar work, and the substantial financial resources of the corporation.

Is the method the professor used to determine her fee proper?

- (A) Yes, if the final fee is less than what the corporation otherwise would have paid.
- (B) Yes, because the professor is not expending time researching.
- (C) No, if she charges a higher hourly fee than would other lawyers in the area for similar work.
- (D) No, because the financial resources of the client should not be considered here.

Question 26.

A defendant retained an attorney in a negligence action. Before trial, the defendant disclosed to the attorney that at the time of the accident, he was dead drunk. The defendant believes that by invoking his constitutional right against self-incrimination and not testifying as to that fact, he will prevail in the suit. The attorney believes, however, that the defendant's position ultimately will not prevail at trial.

If the attorney does not withdraw from the representation of the defendant, is she subject to discipline?

- (A) Yes, because she knows that the defendant committed a crime.
- (B) Yes, because she does not believe that the defendant will prevail.
- (C) Yes, because the defendant's guilt and the attorney's doubt place the attorney in a position where she cannot zealously represent the defendant.
- (D) No, the attorney need not withdraw.

Question 27.

Prior to his recent election as a full-time judge in the Family Court, a judge practiced as an attorney handling trust and estates matters for over two decades, and in more recent years, dedicating a portion of his practice to family law matters.

Since his election, the judge has withdrawn from his family law cases, though he continues to practice on a few matters that are not before the Family Court. In that regard, he is probating a will before the Surrogate's Court and he is serving as the executor of his friend's will.

Is the judge's extrajudicial conduct proper?

- (A) Yes, but only as to the probate matter.
- (B) Yes, but only as to his service as an executor.
- (C) No, only if the conduct will likely require the judge to before the Family Court appear in the future.
- (D) No, because, as a full-time judge, he should refrain from private practice and from serving as an executor.

Question 28.

Attorney Alpha represents Firestone Tire Co. in defending a strict products liability personal injury cause of action involving allegations of manufacturing flaws in Firestone's tire making process. During a massive document production, Alpha inadvertently produced among thousands of documents, an internal staff memorandum. The memo, which was over 100 pages in length, analyzed the controlling law and discussed the strengths and weaknesses of the pending case.

The plaintiff's lawyer, Attorney Beta, while reviewing the boxes of documents in Alpha's law offices, asked to have the internal staff memo copied by a paralegal in Alpha's firm. Before making the copy, the paralegal telephoned Alpha who approved the copy without reviewing the memo, which had been identified to Alpha only by a number stamp.

Two weeks later, Beta realized that Alpha must have inadvertently produced the memo without reviewing it. Beta also understands the importance of the memo to the litigation.

Is Beta subject to discipline?

- (A) Yes, because the document was protected by Firestone's attorney-client privilege and should not have not been read.
- (B) Yes, because the document was attorney work product and Beta knew it was inadvertently disclosed.
- (C) No, if Beta promptly notifies Alpha of the inadvertent disclosure.
- (D) No, since the attorney-client privilege was waived.

Question 29.

A newly appointed associate appellate judge was approached by a law school alumnus about a fundraising project for a new law school library. The judge agreed to attend the fundraising dinner dance, and act as the chairperson for planning purposes, but he made clear to the law school that he could not personally solicit funds from other alumni. He did agree, however, to solicit funds from fellow judges who sit on his appeals court.

Is the judge's conduct proper?

- (A) Yes, but only if he attends and plans the event without soliciting any donations.
- (B) Yes, but only if he attends and plans the event, and personally solicits only from his fellow judges.
- (C) No, because he may not attend a fundraising event.
- (D) No, if he personally solicits donations from anyone.

Question 30.

An attorney was relaxing at the beach when he saw his neighbor limping near the water. The attorney asked his neighbor what had happened to his leg. The neighbor explained that several years ago he had been hit by a negligently driven car, and that he had been limping ever since.

Feeling sorry for his neighbor, the attorney agreed to write, without charge, a letter to driver of the car that had injured the neighbor, demanding reimbursement for the neighbor's injuries and threatening a lawsuit. Even though the attorney knew that the statute of limitations had expired on any negligence claim that the neighbor had, the attorney still filed suit when the driver did not respond to the letter. Again, the attorney did not charge the neighbor. Once suit was filed, the driver contacted the neighbor and settled the matter by paying the neighbor a sum near what the neighbor had lost due to the accident.

Is the attorney subject to discipline?

- (A) Yes, because he started the action knowing that the statute of limitations had expired.
- (B) Yes, because he threatened litigation in a letter to a non-represented person.
- (C) No, because he asserted a valid claim on the neighbor's behalf.
- (D) No, because he did not collect a fee from the neighbor.

Question 31.

A defendant, who was represented by counsel in a criminal case, contacted another attorney to obtain a second opinion on how his case should be handled. At the conclusion of the meeting, the defendant asked the attorney what his fee would be if he took over the case. The attorney advised the defendant that his fee would be \$25,000, but that if the attorney was not successful, the attorney would refund one-half of the fee to the defendant.

Is the attorney subject to discipline?

- (A) Yes, for meeting with a person known to be represented by another lawyer.
- (B) Yes, for the proposed fee arrangement.
- (C) Yes, for both meeting with a person known to be represented by another lawyer and the fee arrangement.
- (D) No.

Question 32.

An 80-year-old widow was hit by the defendant's car while she was crossing the street. As a result of the accident, she incurred \$20,000 in hospital expenses, and undetermined damages for pain and suffering.

The widow retained an attorney to represent her. The attorney, whose practice was extremely busy at the time, ultimately failed to commence an action against defendant within the time allowed by the statute of limitations. Consequently, the widow's claim was time barred.

Is the attorney subject to discipline?

- (A) Yes, but only if the statute of limitations expired within the last 30 days.
- (B) Yes, because he neglected the widow's matter.
- (C) No, and he is not subject to civil liability.
- (D) No, but he is automatically liable to the widow for \$20,000 as a matter of law.

Question 33.

Alpha & Beta, P.C. (“A&B”), is a law firm that has represented big industry for many years. An attorney with the firm has teamed up with Dr. Enviro, a former environmental engineer now serving as a lobbyist, to create a lobbying firm, named AE Inc., for the purpose of assisting industrial manufacturers in voicing their opinions on proposed environmental regulation.

A&B has referred clients in need of lobbying assistance to AE Inc. In doing so, A&B has been diligent in explaining and confirming in writing that AE Inc. is strictly a lobbying firm, it does not provide legal services or advice, and communications with AE Inc. will not be protected by the attorney-client privilege.

Bigco, a client of A&B, retained AE Inc. to lobby for Bigco in connection with proposed regulations which may impact on Bigco’s business. The attorney exclusively assumed the lobbying efforts for Bigco. Separately, Rigco, another large industrial firm, hired AE Inc. to handle its lobbying efforts in connection with the same regulations. Because Rigco’s interests in the proposed regulations are adverse to Bigco’s, Dr. Enviro exclusively will handle the lobbying efforts of Rigco.

Is the attorney subject to discipline?

- (A) Yes, if he failed to obtain informed, written consent from Bigco and Rigco.
- (B) Yes, because he is sharing legal fees with a nonlawyer.
- (C) No, if he creates a sufficient barrier between himself and Dr. Enviro.
- (D) No, because A&B fully informed Bigco that AE Inc. does not perform legal services and communications with AE Inc. are not privileged.

Question 34.

A young child fell into a client’s swimming pool and was injured. The pool was surrounded by a five-foot fence, but the gate to the pool inexplicably had been left open.

After being served with a summons and complaint, the client realized that her homeowner’s insurance policy had lapsed and that she had no insurance to cover the child’s claim. The fact that she could lose her home caused the client to become very anxious.

The client retained an attorney to represent her in the lawsuit. After serving an answer and conducting pretrial discovery, the attorney put the case on the trial calendar. Due to calendar backlog, the clerk told the attorney that the client’s case would not be assigned a trial date for months.

A month later, the client began telephoning the attorney on a daily basis. At first, the attorney returned the client’s calls and explained to her that her case was on hold due to the court’s backlog. When the client continued to call, the attorney told his secretary to advise the client that he would call her only when something new developed. He also told his secretary to tell the client that, unless she stopped repeatedly calling him, he would not return her calls.

Is the attorney’s conduct proper?

- (A) Yes, because a busy lawyer need not personally return phone calls.
- (B) Yes, because he reasonably kept his client informed.
- (C) No, because the attorney did not keep the client informed.
- (D) No, because the attorney delegated a legal function to a nonlawyer.

Question 35.

An attorney was widely recognized both by the profession and by the public as being an excellent litigator. Her practice had reached a point where she went from one trial to another, almost without a day in between.

Two years ago, because of her hectic schedule, she consciously concluded that she would not, for the first time, file a tax return or request an extension even though she knew she had overpaid her taxes and was due a refund. She also knew it was against the law not to file or request an extension to file.

Is the attorney subject to discipline?

- (A) Yes, if the crime is a felony.
- (B) Yes, because willfully failing to file an income tax return indicates a lack of fitness to practice law.
- (C) No, because she knew she was due a tax refund.
- (D) No, because her conduct did not involve the practice of law.

Question 36.

An attorney who had been practicing for 16 years was holding \$127,000 in client funds in his attorney escrow account.

The police recently arrested the attorney's son on drug possession charges, and bail was set at \$100,000. The attorney was unable to post the money.

On her deathbed, the attorney's wife asked to see her son. She was unaware of the drug sale or her son's incarceration. With the intent to have the money replaced within seven days, the attorney took \$100,000 from his attorney escrow account and used it to post bail for his son.

After bringing his son to visit his mother for the last time, the attorney brought his son back to jail and returned the \$100,000 to the escrow account, together with interest.

Is the attorney subject to discipline?

- (A) Yes, because he used escrow funds for personal purposes.
- (B) No, because he immediately returned the funds with interest.
- (C) No, because he did not have a criminal intent.
- (D) No, because the attorney's clients suffered no loss.

Question 37.

An 18-year-old woman was injured in a car accident. While lying in traction in the hospital, an attorney approached her and asked her to allow him to represent her. He fully explained his contingency fee, and the woman agreed to the attorney's representation and fee. After getting out of the hospital, the woman sought to terminate the representation and the attorney immediately consented.

Is the attorney subject to discipline?

- (A) Yes, because he violated the Model Rules of Professional Conduct.
- (B) No, because the bar is powerless to discipline him absent a finding that the complained of conduct caused specific and actual harm.
- (C) No, because client solicitation is constitutionally indistinguishable from advertising.
- (D) No, because client solicitation is constitutionally protected under the First Amendment right to free speech.

Question 38.

A wife consulted an attorney about obtaining a divorce from her husband. In their initial discussions of the possibility of forming a client-lawyer relationship, the attorney did not disclose to the wife that he was inexperienced in the area of matrimonial law and had never handled a divorce case.

After being retained by the wife, the attorney had numerous settlement discussions with the husband's lawyer. During these discussions, the attorney did not inquire about the husband's pension plan. Pension plans are an area into which all matrimonial lawyers inquire, because a pension plan is subject to the other spouse's right to equitably share in such benefit in the event of a divorce.

Only after the divorce was final did the wife consult another attorney and realize that, had the attorney inquired into her ex-husband's pension, the wife would have been entitled to an additional \$150,000 distribution from the pension plan.

Is the attorney subject to civil liability?

- (A) Yes, because he did not tell the wife he was inexperienced.
- (B) Yes, because he did not inquire about the wife's pension plan rights.
- (C) No, because lawyers are not strictly liable for errors of judgment.
- (D) No, if the wife was satisfied overall with the outcome of the case.

Question 39.

As required under its liability insurance policy, an insurance company provided an attorney to represent an insured who was named as a defendant in an automobile collision case brought by a plaintiff. The attorney had represented other insureds on behalf of the insurance company in the past.

The plaintiff's suit seeks damages in an amount that is four times the maximum coverage of the policy. The insured also suffered personal injury and property damage in the collision.

Through the investigation of the plaintiff's claim and discussions with the insured, the attorney determined that the insured may not be entitled to any coverage under the insurance policy.

What is the proper course of action for the attorney to take?

- (A) Take no action that will jeopardize the insured's protection under the policy.
- (B) Seek and disclose information to establish that the insured cannot recover from the insurance company.
- (C) Bring to the attention of the insurance company any information already in the attorney's file establishing a defense to the insured's potential insurance coverage.
- (D) Send copies of the attorney's entire file to the insurance company and the insured and withdraw.

Question 40.

An attorney hired a legal secretary. After three weeks of on-the-job training, the secretary assumed the weekly duty of reviewing each file in the office and advising the attorney of any deadlines for the coming seven-day period.

On one occasion, the secretary negligently permitted a time period to lapse on the worker's compensation claim of a client. The client sued the attorney for malpractice and also filed disciplinary charges against him with the local bar association.

Is the attorney subject to discipline?

- (A) Yes, if the client obtains a malpractice judgment against him.
- (B) Yes, if he failed to reasonably supervise the secretary's review procedures.
- (C) No, if similar mishaps occur to other lawyers.
- (D) No, because the client elected to pursue her malpractice claim rather than file a grievance.

Question 41.

Attorney Alpha represented XYZ Corporation in a lengthy antitrust lawsuit. The outcome of the litigation could result in XYZ Corp. paying close to one billion dollars in penalties.

As the trial approached, Alpha realized that the testimony of Wilma, the retired comptroller of XYZ Corp., was critical in the litigation. Wilma was present at most of the meetings on which the trial would focus.

Wilma has told Alpha that she does not want to be dragged into the lengthy trial. She has said that she will not appear even if ordered by the court. When Alpha told Peters, the President of XYZ Corp., of Wilma's intention to refuse to testify at the trial, Peters became enraged. "She's got some nerve; she had a sexual affair for years with me and now she pretends to be high and mighty. Tell her that if she does not testify, you'll reveal her scandalous sexual activity to her husband."

Alpha called Wilma and told her that unless she testified, Alpha would reveal her prior sexual indiscretions with Peters to her husband.

Is Alpha subject to discipline?

- (A) Yes, because Alpha used improper means to obtain evidence.
- (B) Yes, because Alpha should have served Wilma with a subpoena before threatening her with disclosure of the affair.
- (C) No, because Wilma had a legal duty to testify when properly served with a subpoena.
- (D) No, if Wilma indeed had an affair.

Question 42.

During his summation to the jury at the conclusion of a lengthy trial, the government's lawyer referred to the testimony of the defendant's two witnesses by saying:

- I "Their testimony directly contradicts the testimony given by the government's witnesses."
- II "Who has more reason to lie, the government's witnesses or the defendant's witnesses?"
- III "How can you believe these two witnesses? I've seen many people testify over the years and, in my experience, these witnesses are lying."
- IV "Frankly, I believe that the defendant's witnesses are lying."

Which of the government's lawyer's statements are proper?

- (A) I only.
- (B) I and II only.
- (C) III and IV only.
- (D) I, II, III and IV.

Question 43.

An attorney hired a law student to assist him after school, on weekends, and during vacations in performing the following tasks while she was in court:

- I Preparing discontinuance stipulations and settlement papers for the attorney to discuss with clients.
- II Interviewing witnesses to accidents in personal injury actions.
- III Settling personal injury claims with insurance companies before the commencement of lawsuits.

For which of the above activities would the attorney be subject to discipline if she was aware they were occurring?

- (A) I only.
- (B) II and III only.
- (C) III only.
- (D) I, II and III.

Question 44.

An inventor hired an attorney to represent him in a patent infringement case. The attorney's practice focuses primarily on business litigation, and he has never handled a patent infringement case. The attorney knew that no attorney in the geographic area was competent in patent matters, including himself. However, he took the case.

Is the attorney's conduct proper?

- (A) No, because an attorney should inform a client that he is not competent in patent law.
- (B) Yes, if the attorney planned to become competent in the field of patent law and if this would not be at the expense of the inventor.
- (C) Yes, because there were no other patent lawyers in the area.
- (D) Yes, because a lawyer should "not lightly decline employment."

Questions 45 and 46 are based on the following facts:

An attorney who is a sole practitioner is developing into a well-respected criminal defense attorney.

Recently, two robbers held up a bank, and a bank guard and one of the robbers was killed. The police believe that the second robber was wounded during the crime but escaped, because a witness saw a man bleeding from a chest wound as he walked calmly from the bank.

A suspect with a criminal record retained the attorney to represent him. The police were looking for the suspect because two witnesses reported seeing him within blocks of the bank with blood on his shirt.

The suspect brought the attorney a bloodstained shirt. The suspect told the attorney that while he was walking near the bank the morning of the incident, an old friend covered with blood bumped into him, getting blood on the suspect's shirt. The old friend said he had tripped and fallen on a curb and that he was headed to the hospital.

The attorney wanted to take the suspect's shirt to have it tested by an expert to see if the bloodstains belonged to the suspect or to a third person. The attorney was not certain, however, whether he could ethically take physical possession of potential criminal evidence. The attorney called the County Bar Association and was referred to a member of the Ethics Committee. As cryptically as possible, Alpha disclosed the facts and asked whether he ethically can take physical custody of the shirt to have it tested.

Question 45.

By disclosing this information, is the attorney subject to discipline?

- (A) Yes, because the lawyer to whom he revealed the information was not a member of the attorney's law firm.
- (B) Yes, because the attorneys confidentiality obligation to the suspect precludes the attorney's disclosure.
- (C) No, because such disclosures are permitted due to the importance of a lawyer's compliance with the Rules of Professional Conduct.
- (D) No, because the disclosure was made to another lawyer.

Question 46.

Assume for this question that the attorney did not seek advice from the Ethics Committee. Assume further that the attorney took the suspect's shirt and had it tested.

Is the attorney subject to discipline?

- (A) Yes, because the attorney is unlawfully obstructing the police from access to critical evidence.
- (B) Yes, because the attorney is hindering the prosecution of the suspect, and the attorney is also subject to criminal liability.
- (C) No, because the attorney is entitled to zealously represent the suspect.
- (D) No, if applicable law allows the attorney to temporarily possess the shirt to test the blood without altering or destroying the evidence.

Question 47.

An attorney agreed to represent a client in a complex litigation which would consume the ensuing three months in preparation for the trial.

Under the agreement, the attorney was to refrain from all other employment during the time period leading up to the trial. The fee was not fully determined, but the client advanced \$30,000.

During the first month of trial preparation, the attorney turned down \$30,000 worth of business. Into the second month, the attorney and the client began to disagree about strategy and the client fired her. The attorney refused to return any of the \$30,000 retainer.

Is the attorney subject to discipline?

- (A) No, because when a client breaches a retainer agreement with an attorney, the client forfeits the retainer.
- (B) No, if the retainer represents a reasonable value for her services.
- (C) Yes, because when she was fired, the attorney forfeited all claims to fees.
- (D) Yes, because, the fee was not determined at the outset and not put into writing.

Question 48.

A law firm's partnership agreement provided that upon a vote of 80% of the partners, a partner could be discharged from the partnership, and that, for a period of one year after such discharge, the partner would be paid, as her entire buy-out retirement package, 150% of her preceding year's salary.

A partner was discharged from the firm in accordance with the terms of the partnership agreement.

Was the payment to the discharged partner proper?

- (A) Yes, because the amount paid was not excessive.
- (B) Yes, because, although she was discharged, she was paid pursuant to a separation or retirement agreement.
- (C) No, because the firm shared its legal fees with one who did not work on the firm's current cases generating those fees.
- (D) No, because the partner's status as a partner was lost when she was discharged.

Question 49.

An attorney's practice focuses almost exclusively on tax certiorari matters. The attorney generally seeks to obtain lower tax rates on residential and commercial properties owned by her clients.

One morning at about 4:00 a.m., the attorney was awakened by a telephone call from one of her clients. The client had just been arrested for driving while intoxicated and sought the attorney's advice on whether she should consent to a breathalyzer test. The attorney indicated she did not practice in this area and was really not competent to render an opinion. The client said that she did not care, the attorney had to help her as she had to consent within two hours of her arrest, and she had only four minutes remaining to make her decision. The attorney consented to help and told her not to take the test.

Unbeknownst to both the attorney and the client, a statute required the automatic forfeiture of one's driver's license for failure to take a breathalyzer test. As a result of not taking the test, the client lost her license.

Is the attorney subject to discipline?

- (A) Yes, because she was not adequately prepared to render legal assistance.
- (B) Yes, because she handled a legal matter that she was not competent to handle.
- (C) No, because she explained her deficiency and the client consented.
- (D) No, because she acted in an emergency situation.

Question 50.

A professor of law at a local law school was an expert in the field of civil procedure. The state bar association contacted him to conduct its upcoming continuing legal education seminar on civil procedure, and asked that he compile all the information necessary for that seminar. The bar association does not intend to compensate the professor for his services. Finals are approaching and the professor is busy, so he is considering declining.

Is the professor subject to discipline if he declines the bar association's request?

- (A) Yes, if there are no other experts in the area.
- (B) Yes, unless the seminar will not interfere with his duties as a lawyer and law professor.
- (C) No, if he has already completed his yearly *pro bono* obligation.
- (D) No, because the bar association's request is not equivalent to a court appointment.

Question 51.

A client inherited a substantial amount of money. Not satisfied with her bank's interest rates, the client decided to lend her money directly to private individuals, on the condition that the loans were secured by first mortgages on real estate owned by the borrowers. The client refused to settle for second mortgages, because she knew that they can be extinguished by foreclosure of the first mortgage on the same property.

The client hired an attorney to negotiate, draft, and record the necessary loan and mortgage documents to secure her first loan. After expending substantial time negotiating with the first borrower's attorney, the attorney determined that the existing first mortgage on the borrower's realty could not be paid off and that the borrower could only tender a second mortgage to secure repayment of the client's loan.

Believing that a second mortgage on this property was more than adequate security to secure the client's loan, the attorney went through with the loan transaction without consulting the client. Both the client and borrower signed the documentation, the loan was made, and the second mortgage was recorded.

Is the attorney subject to discipline?

- (A) Yes, but only if the borrower defaults on the loan.
- (B) Yes, because the attorney did not abide by the client's decision.
- (C) No, because clients usually defer to the special knowledge and skill of their lawyers with respect to the means used to accomplish a given objective.
- (D) No, if the attorney acted with reasonable diligence and promptness in representing the client.

Question 52.

Since Attorney Alpha's admission to the bar, Alpha has never practiced law. Alpha is employed by a large corporation that distributes filters for machines that purify blood. Alpha is a key executive for the corporation, but his tasks do not in any way involve the practice of law.

Alpha is being sued for divorce by his wife, Spouse. Attorney Bravo is representing Spouse. After commencing the divorce action, Spouse confides in Bravo that Alpha has a large assortment of homemade videos on his computer involving young children engaged in inappropriate sexual activities. Spouse advises Bravo that Spouse has observed Alpha watching these movies on numerous occasions. Spouse also advises Bravo that Alpha has sexually abused their eight-year-old son who is currently undergoing psychiatric care due to the trauma he has experienced because of Alpha's misconduct.

Is Bravo subject to discipline if Bravo does not report Alpha's conduct to appropriate disciplinary authorities?

- (A) Yes, but only if Alpha is first convicted of this private misconduct.
- (B) Yes, provided that Beta has obtained Spouse's informed consent.
- (C) No, since Alpha's misconduct does not reflect adversely on Alpha's honesty, trustworthiness or fitness as a lawyer.
- (D) No, because Alpha's conduct was unrelated to the practice of law.

Question 53 and 54 are based on the following facts:

An attorney represented multiple plaintiffs bringing personal injury claims against Rizco, the manufacture of a diabetes drug that inflicted serious and sometimes lethal damage on its users' livers.

After pursuing the claims of the numerous plaintiffs, Rizco advised the plaintiffs' attorney that it would offer a lump sum of \$50,000,000 to settle all of his client's claims. Rizco gave plaintiffs' attorney the discretion to allocate the appropriate amounts to each of his clients, provided that all of them agreed to settle within the \$50,000,000 aggregate settlement amount.

The plaintiffs' attorney wrote to one of his clients and advised her that a proposed settlement had been offered by Rizco and that two million dollars had been allocated to his client's claim. The client was elated about the settlement amount she was allocated, because she was a heavy drinker of alcohol and did not think that her claim would prevail if the matter was tried in court. When the client inquired as to the amounts allocated to each of the other plaintiffs, the plaintiffs' attorney told his client that such information was confidential, and that disclosure of it was protected as a client confidence. The client understood, consented to the settlement amount, and signed a writing fully releasing Rizco from further liability.

Question 53.

Is the plaintiffs' attorney subject to discipline for failing to disclose the settlement allocation information to his client?

- (A) Yes, because his client's consent was not informed.
- (B) Yes, unless the disclosure could be used to another class member's disadvantage.
- (C) No, because the client consented in a signed writing to the settlement.
- (D) No, because such information involving plaintiffs' attorney's other clients is subject to the attorney-client privilege belonging to the other class members.

Question 54.

Assume for this question only that the plaintiffs' attorney's conduct in the settlement violated the Rules of Professional Conduct.

After each of his clients had been paid and the plaintiffs' attorney received his contingent fee, one of his client learned what the other plaintiffs received. The client now believes that she should have received a substantially larger amount.

Can the client recover the contingent fee paid by the client to plaintiffs' attorney as a result of the settlement?

- (A) Yes, because a violation of the Rules of Professional Conduct automatically gives rise to civil liability.
- (B) Yes, because a lawyer's breach of a duty to a client permits a court to order a forfeiture of a legal fee.
- (C) No, unless the client suffered a loss proximately caused by the plaintiffs' attorney's conduct.
- (D) No, because there is no separate cause of action for ethical malpractice.

Question 55.

A client was very displeased with his attorney's lack of professionalism, promptness, skill, and knowledge during his representation of the client in her divorce action. Following the conclusion of her divorce, the client retained a new attorney to sue her former attorney for legal malpractice.

After the litigation had progressed to the eve of trial, a settlement was reached in which:

- I. The client and her former attorney agreed not to reveal the terms or the amount of the malpractice settlement;
- II. The client agreed as a condition to the settlement not to testify against her former attorney in the event a disciplinary proceeding was commenced against the former attorney for his unethical conduct during the client's divorce action; and
- III. The new attorney agreed not to commence or participate in any future legal malpractice claim against the former attorney by any future or former client of the former attorney.

For which agreements will the former attorney subject to discipline?

- (A) I and II only.
- (B) II and III only.
- (C) I, II and III.
- (D) III only.

Question 56.

A judge was appointed to the trial court two years ago. Previously, she had been a litigator in a large firm that primarily represented personal injury plaintiffs. The judge is extremely well versed in and familiar with the rules of evidence and civil procedure, especially with respect to cases involving personal injury.

In the two years while sitting on the bench, the judge had gained the respect of the bar for her courtroom skill, knowledge, and temperament. The judge is adept at settling cases that needed to be settled and at skillfully conducting trials and promptly rendering just and insightful opinions where cases did not settle.

Recently, after a complex antitrust trial, the judge had lunch with another judge in the same courthouse who is well versed in antitrust matters. The judge sought out the antitrust-savvy judge's assistance because he had never handled antitrust cases either as a lawyer or judge. The other judge, who had a reputation for being pro-business in the antitrust legal community, was able to clarify and convince the judge to rule on several issues in the case.

Are the judge's conversations with the other judge proper?

- (A) No, because the judge should not consider *ex parte* communications outside the presence of the parties or their attorneys on a pending matter.
- (B) No, if the judge did not send a written synopsis of the oral conversation to the attorneys of both parties.
- (C) Yes, but only if both parties first consented to the conversation.
- (D) Yes, because the *ex parte* communication prohibition does not apply to communications between these judges.

Question 57.

Save-the-Children is a charitable organization devoted to the rights, health, and safety of children around the world. Save-the-Children has retained an attorney to draft the wills of potential donors who have indicated an intent to make a testamentary bequest to Save-the-Children. The charity has agreed to pay the attorney's standard fees for drawing such wills.

One recent day, Save-the-Children contacted the attorney to arrange for a donor, to come into the attorney's office to make out her will. The charity advised their attorney that the donor had indicated an intent to make a testamentary bequest of \$800,000 to Save-the-Children. When the donor came in to discuss her will, she initially indicated various donees who would be named and benefit under her will. When she mentioned Save-the-Children, the donor stated the sum of \$100,000. The attorney then asked her whether in fact she had intended to leave the charity \$800,000. The donor replied, "maybe you are right," and she increased the sum left to the charity to \$800,000.

Is the attorney subject to discipline?

- (A) Yes, because the attorney cannot represent both Save-the-Children and its donor simultaneously.
- (B) Yes, because the donor's informed consent was not obtained and the attorney is not exercising independent professional judgment on the donor's behalf.
- (C) No, because the attorney's fee is being paid by the charity, thus defeating the donor's reasonable expectation of confidentiality.
- (D) No, because the donor had initially wanted to give the charity \$800,000.

Question 58.

A defendant was indicted for the armed robbery of a deli that occurred last year on the night of November 13th. The defendant and his attorney appeared at the arraignment, and the defendant pled not guilty to the indictment. The defendant told his attorney that, on the night of November 13th, the defendant spent the night at his mother's house, eating dinner and watching television. The defendant told his attorney that only he and the mother were home that night.

The attorney made arrangements for the defendant's mother to come into the attorney's office for an interview. After discussing the defendant's alibi defense with the defendant's mother, the attorney asked her if she remembered spending that night with her son. She told defendant's attorney that, "honestly, I don't have a very good memory any more, and I just don't remember what I did that particular night. It is too long ago. Maybe it will come to me."

In concluding the meeting with defendant's mother, the attorney told her not to discuss that night with anyone, especially someone from the prosecutor's office.

Is the attorney subject to discipline?

- (A) Yes, because an attorney may not request that a witness refuse to give relevant information to another party.
- (B) Yes, because the attorney knowingly interfered with an ongoing government investigation.
- (C) No, provided the attorney reasonably believed that defendant's mother's interest would not be adversely affected by refraining from giving such information.
- (D) No, because the attorney may treat defendant's mother and instruct her as his own client.

Question 59.

One of the current matters pending before a judge involves a strip-mining violation allegedly committed by the defendant. The defendant is represented by a large law firm, and its lead counsel is one of the firm's partners, Bravo.

The judge's law clerk has been substantially involved in the strip-mining matter. Indeed, since taking the position with the judge 14 months ago, the law clerk has devoted his time almost exclusively to the strip-mining matter.

The clerkship is due to end in two months, and the law clerk has been exploring employment possibilities with private firms. Bravo has become aware of the law clerk's desire to work for a law firm. Bravo has been impressed with his skills as the judge's judicial law clerk, so much so that Bravo approached the law clerk to inquire as to whether he would be interested in working for Bravo's firm.

What is the proper course of action for the law clerk to take in order to negotiate with Bravo?

- (A) Obtain written consent to negotiate from all parties in the strip-mining matter.
- (B) Obtain written consent to negotiate from the judge.
- (C) Notify the judge.
- (D) First resign from his clerkship position.

Question 60.

An attorney agreed to represent a corporation in a breach of contract suit against a defendant who had been hired to oversee construction of a new plant.

In the attorney's written retainer letter, the scope of the attorney's services, the hourly legal fee, and an estimate of the total cost for legal fees and expenses were spelled out in detail.

The attorney also included in the retainer letter a clause that required binding arbitration of any dispute concerning legal fees, or any claim by the corporation against the attorney for legal malpractice.

Is the attorney subject to discipline?

- (A) Yes, because a lawyer cannot prospectively attempt to limit the lawyer's malpractice liability to the client.
- (B) Yes, unless the corporation has been fully apprised of the advantages and disadvantages of arbitration and has given its informed consent to the arbitration clause.
- (C) Yes, because it is against public policy to submit such disputes to binding arbitration.
- (D) Yes, but only if the arbitration is non-binding.

Answer to Question 1

(C) - A lawyer shall not knowingly fail to disclose to the tribunal legal authority of the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. *Rule 3.3(a)(3)*. This requirement imposes on an attorney an affirmative duty to disclose; even though all papers on the motion have been finally submitted, the disclosure duty continues until the proceeding is “concluded,” *Rule 3.3[c]*, i.e., “when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.” *Rule 3.3 cmt. 13*. Here, the attorney satisfied this obligation to the tribunal. However, the Rules require more. In that regard, Rule 3.5 prohibits *ex parte* communication with the court on the merits of the case. When an attorney submits anything to the court, counsel must simultaneously deliver a copy of the writing to all other attorneys involved in the matter (not just the parties adversely affected by the recent decision). Thus, choice (C), which states that the attorney notified all parties in addition to the court, is better than choices (A), (B) and (D).

Answer to Question 2

(A) - Because an attorney may threaten to file a well-founded criminal charge with the appropriate prosecutor’s office, choice (B) is not correct. The attorney’s conduct was improper here because there was no basis in law or fact to believe that the employee’s conduct was criminal, i.e., no “well-founded belief” by the attorney that the employee’s conduct was illegal. *Rule 8.4 annot. (2011)*. Thus, choice (A) is the best choice.

In the present problem, even if there was a potential civil claim, the attorney did not have a well-founded belief that the criminal charges were warranted. Thus, choice (C) is incorrect. Moreover, Rule 8.4 would be violated because the statement did not accurately reflect the attorney’s intent, and the attorney would be subject to discipline for engaging in conduct “involving dishonesty, fraud, deceit or misrepresentation.” *Rule 8.4(c)*. None of these violations is cured or excused by the concept of zealous representation, so choice (D) is also incorrect.

Answer to Question 3

(C) – “A lawyer who has served or is currently serving as a public officer or employee is personally subject to ... the prohibition against concurrent conflicts of interest.” *Rule 1.11 cmt. 1*. “Mandatory termination of representation by a lawyer-legislator should occur when the legislator’s public responsibilities will or are likely to adversely affect his independent professional judgment on behalf of the client. A lawyer-legislator shall not use his public position to obtain special advantage in legislative matters for himself or for a client when he knows or it is obvious that such action is not in the public interest.” *Maine Op. No. 28 (2-4-82)*. Thus, choice (C) is correct and choice (A) is not. Further, choice (B) is not correct because Rule 1.10 (imputed disqualification of the lawyer’s firm) states that if lawyers are associated in a firm and one of them is disqualified due to a conflict under Rule 1.7 or Rule 1.9, then none of the lawyers in the law firm can represent the client (unless the conflict is based on the personal interests of one of the lawyers, which is not the case here.)

Moreover, the Comment and the Report's Note to Restatement (Third) of the Law Governing Lawyers section 37 further point out that, where a lawyer is required to withdraw based on an obvious conflict of interest, the lawyer must also forfeit the fee. Further, if a lawyer cannot handle a matter because of a conflict, the lawyer cannot receive a forwarding fee from the new lawyer. Thus, choice (D) is not correct.

Answer to Question 4

(D) - Rule 5.6 states "[a] lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." The Rules proscribe both the offer and the acceptance of such an ethically improper offer.

Thus, both the provision restricting the right of Wanda to contact firm clients and the one restricting her right to practice in New York City violate Rule 5.6. Therefore, choices (A) and (B) are not correct. Moreover, both Wanda and the firm are subject to discipline for entering such an arrangement, so choice (D) is better than choice (C).

Answer to Question 5

(D) - The Rules state that a lawyer "shall not solicit any substantial gift from a client" or "prepare an instrument giving the lawyer or a person related to the lawyer a substantial gift" (unless the person making the gift is related to the lawyer). *Rule 1.8(c)*. Here, that attorney did not solicit the \$50,000, so he may properly accept the gift, making choice (D) correct and choice (A) is incorrect.

Note that while an attorney may accept a substantial, unsolicited gift from a client, the transaction must meet "general standards of fairness" and "may be voidable under the doctrine of undue influence." *Rule 1.8 annot. at 150 (2011)*. A presumption of overreaching and undue influence arises when a lawyer accepts a gift from a client. Simple gifts such as a present at a holiday or as a token of appreciation are in no way prohibited. *Rule 1.8 cmt. 6*.

Note that the builder, as a nonlawyer, is not subject to discipline under the Model Rules of Professional Conduct. Thus, choices (B) and (C) are not correct. Note also that the Rules specifically prohibit a lawyer from preparing an instrument (e.g., deed, will or trust) that transfers a gift to the lawyer, except when the client has a family relationship with the lawyer-donee.

Answer to Question 6

(B) - While under Rule 3.4(c) a lawyer should not knowingly disobey a court order, the directive to close the bookstore did not come from a tribunal. Therefore, the attorney may properly advise the client to obey or disobey the cease and desist order pending the litigation. Thus, choice (B), which focuses on the fact that the order is not from the court, is the best answer. Choice (A) is not necessarily incorrect, but it is too broad in that the attorney's good faith belief would not be sufficient if the order the client received was issued by a court. Choice (C) is not factually correct because the client is not instructing the client to commit a crime. Choice (D) is not correct because the attorney may instruct the client to ignore the order because the order is not from a court.

Answer to Question 7

(C) - Prosecutors may "inform the public of the nature and extent of the prosecutor's action that serve a legitimate law enforcement purpose," but shall refrain from making extrajudicial statements. *Rule 3.8 cmt. f; Restatement (Third) of the Law Governing Lawyers § 109 cmt. E (2000)*. In that regard, under Rule 3.6(b)(2), a lawyer involved in the litigation or a member of that lawyer's firm may publicly state any information contained in a public record, and, under Rule 3.6(b)(1), statements of "the offense involved" are permitted. A lawyer shall not, however, make a statement outside the proceeding that the lawyer should reasonably expect to be disseminated to the press if the statement is likely to materially prejudice a juror, or intimidate or influence a prosecution witness in the proceeding. *Restatement (Third) of the Law Governing Lawyers § 109(1) (2000)*.

While the statements involving the charge and sentence it carries have a legitimate law enforcement purpose of informing "the public of the nature and extent" of the prosecutor's actions, the comments about the "reports" of prior similar criminal conduct have a "substantial likelihood of materially prejudicing" the criminal trial (Rule 3.6(a)) as well as "heightening the public's condemnation" of Jim (Rule 3.8(f)). Accordingly, choice (A) is too broad and choice (C) is the best answer.

Choice (B) is not factually correct, and, even if the statements were all true, they still could be too inflammatory to potential jurors to be proper. Likewise, choice (D) is incorrect because explaining the punishment associated with a crime is not impermissible.

Answer to Question 8

(D) - Choice (D) is the best answer. Under CJC Section 3.13(B)(1), it would not be improper for Judge to accept her brother's favorable loan since it falls within "a gift, loan, bequest, benefit, or other things of value, from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the judge would in any event require disqualification." Note that CJC Section 3.13(B)(4) permits loans to judges from lending institutions in the regular course of the bank's business on terms generally available to the public (not interest free).

Choice (A) is incorrect because, although gifts may be given to a judge by friends or family members on special occasions (wedding, anniversary, etc.) because such gifts do not create the appearance of impropriety, the gift must be *commensurate with the occasion* and relationship. Here, the facts state that the gift was a substantial loan and the occasion was Thanksgiving, a holiday not generally considered one for substantial gift giving. In addition, the extension of the loan clearly was more than “ordinary hospitality,” and, thus, choice (B) is also incorrect.

Choice (C) is incorrect because its language (“does not interfere with the judge’s performance”) echoes the standard for allowing a judge to act as a fiduciary for family members. *CJC §3.8(4)* (“will not interfere with the proper performance of judicial duties”). Moreover, under CJC Section 2.11(A)(2)(c), the judge must disqualify herself if her impartiality might reasonably be questioned, such as when a relative within the third degree of consanguinity is a party, acting as a lawyer, or has more than *de minimis* interest in the matter. Here, the gift will not interfere with the judge’s judicial activities because her brother may not appear before the judge.

Answer to Question 9

(B) - Rule 8.4 states that it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer....” *Rule 8.4(b)*. The Commentary to Rule 8.4 indicates that “a pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.” *Rule 8.4 cmt. 2*. Thus, choice (B) is correct. The facts that the attorney’s drug use did not affect his work performance, and that he worked for the government, are irrelevant here. Thus, choices (C) and (D) are incorrect. In addition, an attorney is not necessarily subject to discipline for pleading guilty to a misdemeanor. Thus, choice (A) is not the best answer.

Answer to Question 10

(C) - Rule 8.3(b) states that a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that *substantially* compromises the judge’s fitness for office shall inform the appropriate authority. Note that, while the conduct suggested in answer choice (A) is not necessarily improper, the attorney has an affirmative duty, making Choice (B) incorrect. Thus, choice (C) is the best answer. Of course, choice (D) is not the best choice.

Answer to Question 11

(B) - A lawyer may pay for the reasonable expenses, including hotel, meals, travel, and lost wages, incurred by a witness (but not a witness’s spouse) in attending a proceeding. “[I]t is not improper to pay a witness’s expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.” *Rule 3.4 cmt. 3*. Rule 3.4(b) prohibits paying an inducement to a witness that is prohibited by

law. A lawyer shall not pay a bonus or contingent fee to a nonlawyer. *See A.B.A. Formal Op. 96-402 (1996)*. Thus, choices (C) and (D) are incorrect.

Accordingly, the attorney may pay for his witnesses' airfare, hotel, meals and lost wages, but he may not offer them a bonus contingent on the outcome of his case. Choice (B), therefore, is correct. Choice (A) is too limited, in that a lawyer also may reimburse witnesses for their lost wages, as well as pay experts a reasonable fee for their services.

Answer to Question 12

(A) - Rule 3.5(c) permits post-verdict communications with jurors unless prohibited by law or court order; the lawyer knows the juror does not want to be contacted; or the communication involves misrepresentation, coercion, duress, or harassment. Here, the attorney's proposed questions are proper on their face and the facts do not indicate that they would otherwise be prohibited. Thus, choice (A) is correct, and choices (C) and (D) are not. Choice (B) is incorrect because jurors have no duty to speak to counsel after the trial.

Answer to Question 13

(D) - A contingent fee is permissible even when liability is clear and some recovery is certain. *A.B.A. Formal Op. 94-389*. Where a lawyer is reasonably certain that, as soon as the case is filed, the defendant will offer a settlement amount the client will accept, then the contingent fee agreement should reflect the likelihood of early settlement and provide for a significantly smaller fee percentage. Rule 1.5(c) mandates that a contingent fee arrangement must be set forth in a writing signed by the client. Choices (A) and (B) are incorrect because they are incorrect statements of law.

Choice (C) is incorrect because contingent fees are not available in all cases; for example, they are prohibited in divorce and criminal cases. *Rule 1.5(d)*.

Answer to Question 14

(D) - Under Rule 1.15, a lawyer shall promptly deliver to the client any funds or property to which the client is entitled and render a full accounting thereof. *Rule 1.15(d)*. Under Rule 1.15(e), when in the course of representation a lawyer is in possession of fees or property in which both the lawyer and the client claim an interest, and a dispute arises concerning the respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

Here, there is no dispute that the \$1,000 for bail and the unused portion of the retainer should be returned. Accordingly, the attorney should refund the \$1,000, plus the \$75 to which the attorney has no claim. The \$225 for the three hours of work, however, over which there is a dispute between the attorney and the client, should remain in escrow until the dispute is resolved. Thus, choice (A) is incorrect and choice (D) is correct.

Answer to Question 15

(C) – “During a proceeding a lawyer may not communicate *ex parte* with a person serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.” *Rule 3.5 cmt. 2*. It does not matter whether the lawyer is connected with the case or not, or whether it is a grand jury or petit jury. Conduct in violation of Rule 3.5 also violates Rule 8.4, which prohibits conduct prejudicial to the administration of justice. Thus, both Attorney Norman and Attorney Carl must refrain from discussing the antitrust case with Lilli, and choice (C) is correct.

Answer to Question 16

(A) - If a lawyer is called upon by a court to represent a litigant who otherwise would be unable to obtain legal representation, under Rule 6.2, the lawyer should not seek to be excused from representing that individual except where (1) “repugnance of the client or the cause” is likely to impair the attorney’s ability to represent the client; or (2) representing a client would violate the Rules (e.g., the representation would give rise to a conflict of interest or the lawyer is unable to render competent legal services).

Here, the attorney could properly decline the court’s appointment if she felt a strong repugnance for Airco. Thus, choice (A) is correct. Neither fear of client insolvency nor a distaste for a type of litigation is a proper ground for declining a court appointment. Finally, the attorney’s neighbor’s status is not relevant under the facts given.

Answer to Question 17

(B) - Rule 1.5(a) states that a lawyer “shall not make an arrangement for, charge, or collect an unreasonable fee.” The factors that are to be considered in determining whether a fee is reasonable include (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer, (3) the fee customarily charged in the locality for similar legal services, (4) the amount involved and the results obtained, (5) the time limitations imposed by the client or by the circumstances, (6) the nature and length of the professional relationship with the client, (7) the experience, reputation, and ability of the lawyer or lawyers performing the services, and (8) whether the fee is fixed or contingent. *Rule 1.5(a)(1)-(8)*. The Rule 1.5(a) factors are contained in the Pieper Mnemonic **RENT A SERF**.

Because loss of other employment and experience and reputation are both valid reasons for charging a higher fee, choice (B) is better than choice (A). Under these facts, the fee charged is not necessarily unreasonable, so choice (D) is not correct. Choice (C) is not correct because, as stated above, different firms may have valid reasons for charging different fees to handle the same type of work.

Answer to Question 18

(B) – “It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” *Rule 8.4(c)*. Thus, an attorney cannot send a letter threatening court action when he knows the client does not intend to take the matter to court. Under these circumstances, the letter is a misrepresentation and amounts to deceit. Thus, choice (B) is correct. Also, note that it is generally not unethical to threaten to bring a civil action against a person unless the attorney knows that the client will not bring such an action; if the lawyer knows that the client has no intention of commencing an action, the lawyer’s threats of litigation constitute false statements to a third person in violation of Rule 4.1(a).

Choice (D) is incorrect because, unlike in tort and contract law, neither damages nor detrimental reliance is a necessary element in demonstrating fraud or deceit in the context of an ethical violation. Because neither malice nor the possibility of bringing a valid suit is an element of an ethical violation here, choices (A) and (C) likewise are not correct.

Answer to Question 19

(B) - Upon receipt, the lawyer must deposit a client’s funds in a separate account that indicates that it contains funds or property belonging to someone other than the lawyer, e.g., “trust account” or “escrow account.” *Rule 1.15(a)*. The Rules also prohibit a lawyer from commingling the lawyer’s private funds with client funds. *Rule 1.15(a)*.

Here, the attorney is guilty of sloppy accounting, which amounts to sanctionable conduct. While the attorney need not have a separate escrow account for each client, he must keep his personal accounts separate and apart from his client accounts. Thus, choice (B) is better than choice (A). The fact that the attorney did not otherwise misappropriate the funds in the account is not relevant. The anti-commingling rule seeks to ensure that creditors of a lawyer are not able to attach client funds or property. Thus, choices (C) and (D) are incorrect.

Answer to Question 20

(B) - A lawyer is subject to discipline if the lawyer knowingly makes a materially false statement or deliberately fails to disclose a material fact in connection with the application for admission to the bar. *Rule 8.1*; see also *Rule 8.3* (requiring lawyer’s disclosure to the appropriate professional authority of another lawyer’s violation of Rules of Professional Conduct that raises substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects). The Comment to Rule 8.1 states that “[t]he duty imposed by this Rule extends to persons seeking admission to the bar [i.e., the law school graduate] as well as to lawyers.” *Rule 8.1 cmt. 1*. Here, Beta did not make any misrepresentations in her letter, so choice (A) is not the best choice. “Paragraph (b) of [Rule 8.1, however] also requires correction of any prior misstatement ... that the applicant or lawyer may have made....” *Rule 8.1 cmt. 1*. Thus, choice (B) is the best answer.

Choices (C) and (D) are not correct because Rule 8.1 states that “a lawyer in connection with a bar admission application ... shall not fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter....” *Rule 8.1(b)*.

Answer to Question 21

(D) - If fees are owed to an attorney at the close of the attorney-client relationship, the attorney may assert a charging lien (levied against the client’s recovery in the case) or a retaining lien (asserted over the client’s papers and property in the attorney’s possession) to encourage the payment of the fees. Thus, choices (A) and (B) are incorrect, and choice (D) is the correct answer. The attorney is not required under the Rules to offer arbitration before filing such a lien, and, therefore, choice (C) is not correct.

Answer to Question 22

While CJC Section 4.2(A)(4) prohibits a judge from contributing to a political organization or a candidate for public office, the Rules do not prohibit any affiliation with a political party, therefore, choice (A) is incorrect.

CJC Section 4.1(A)(5) states that judges “shall not attend or purchase tickets for dinners or other events sponsored by a political organization or candidate for public office.” Therefore, choice (B) is correct. Sections 4.2(B)(4) and (6) permit such conduct from a *candidate* for elective judicial office, but this question clearly indicates that the judge has been re-elected and has resumed her judicial functions; that is, she is no longer a candidate. The fact that the question points out that her term is only four years and that the “the next election is never far away” will not affect the answer, because Sections 4.2(B) and (C) only permit such activity within a limited period of time (decided by the state legislatures) before an electoral event. Thus, choices (A), (C), and (D) are incorrect, and choice (B) is correct.

Answer to Question 23

(A) - Rule 8.3 imposes an affirmative duty on an attorney possessing unprivileged knowledge of ethical breaches giving rise to a substantial question as to another lawyer’s honesty, trustworthiness, or fitness as a lawyer, to report such breaches to the appropriate authorities. *Rule 8.3(a)*. Because O’Malley’s perjury charge bears on his “honesty, trustworthiness or fitness” as a lawyer, Attorney DiPaolo is required to disclose the charge to the state bar. *Rule 8.4(b)*.

It is professional misconduct for a lawyer to engage in illegal conduct that “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer.” *Rule 8.4(b)*. It is also professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” *Rule 8.4(c)*. However, “[t]raditionally, the distinction was drawn in terms of offenses involving ‘moral turpitude.’ That concept can be construed to include offenses concerning certain matters of personal morality, such as adultery and comparable offenses that have no specific connection to fitness for the practice of law.” *Rule 8.4 cmt. 2*. Thus, although O’Malley’s adulterous affair may involve “moral turpitude,” it does not relate to his fitness as an

attorney. Therefore, O'Malley's affair does not constitute professional misconduct, and Attorney DiPaolo need not report it to the state bar. Accordingly, choice (A) is correct.

Answer to Question 24

(B) - Rule 1.9(a) states that "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

Here the two matters, unfair bargaining practices and coal mining safety, are unrelated. The lawyer's duty of loyalty ceases when the lawyer ceases the representation of one client. The attorney cannot switch sides, but likewise the lawyer is not forever barred from representing future clients whose interests may be adverse to the former client. The attorney here, therefore, may properly testify at the hearing, and choice (B) is correct. Keep in mind, however, that even after the attorney-client relationship has ended, the duty of confidentiality continues. *Rule 1.9(c)*. Thus, the attorney, in her testimony before the committee, could not disclose confidences of the former client (the Coal Miners' Union).

Also remember that, when a non-adjudicative legislative or administrative hearing is conducted to gather facts as a basis for enacting laws, rules, policies, or regulations, any attorney appearing before that body "shall disclose that the appearance is in a representative capacity...." *Rule 3.9*. "The requirement prevents lawyer-lobbyists from masquerading in the role of concerned citizen in supporting or opposing legislation or other policy.... More seriously objectionable are instances in which a lawyer appears in a legislative hearing to oppose legislation in one guise (as spokesperson for a bar committee, for example) without disclosing that clients of the lawyer also wish to defeat the legislation." C. Wolfram, *Modern Legal Ethics* §13.8.2 at 751 n.78 (1986).

Answer to Question 25

(D) - Rule 1.5(a) lists the factors to consider in charging a client. Although the time spent by a lawyer is frequently a major factor, if the lawyer is an expert and, therefore, does not need to expend a great deal of time on a matter, then the "expertise, reputation and ability of the lawyer ... performing the services [Rule 1.5(a)(7)] as well as ... the skill requisite to perform the legal services properly: are appropriate factors to consider in fixing a reasonable fee. *Rule 1.5(a)(1)*.

Rule 1.5(a)(3) states that another relevant factor is "the fee customarily charged in the locality for similar legal services." The professor may, therefore, consider the fees charged by other lawyers, though she need not use that fee as a ceiling. Thus, choice (A) is not correct.

Although lawyers have an obligation to provide legal services to the indigent, (Rule 6.1) the wealth of a client should not be a factor in determining a reasonable fee. Thus, choice (D) is the best answer.

Answer to Question 26

(D) - The fact that a criminal defendant admits guilt or a civil party admits fault is not a basis for a lawyer to withdraw or decline employment. Here, because the defendant will refuse to testify, there is no danger of client perjury. Thus, choice (D) is correct.

While interposing a defense not warranted under existing law is "frivolous" and doing so would subject the attorney to discipline, Rules 1.6 & 3.1, an action is not frivolous merely because the lawyer believes that the client's position ultimately will not prevail. *Rule 3.1 cmt. 2*. Thus, the attorney will not be subject to discipline if she continues to competently represent the defendant.

Answer to Question 27

(D) - Except for part-time judges, judges shall not practice law. *CJC §3.10*. Probating a will for a client constitutes the practice of law, so it is not proper for a judge to do so. This prohibition does not prevent a judge from acting as the judge's own attorney (*pro se*), or from providing legal advice to and drafting or reviewing documents "for a member of the judge's family, but [a judge] is prohibited from serving as the family member's lawyer in any forum." *Id.*

In addition, a judge should not serve as an executor, administrator, trustee, guardian or other fiduciary except for family members, and even then, only if so serving will not interfere with the judge's judicial duties and the proceedings will not appear before the court where the judge sits. *CJC §3.8*. Since the friend here is not a member of the judge's family, it would not be proper for the judge to continue serving as the executor of his friend's will. Thus, choice (D) is correct.

Answer to Question 28

(C) - Rule 4.4(b) provides that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent, shall promptly notify the sender." Thus, choice (C) is the best answer.

Choice (A) is incorrect because, in *S.E.C. v. Cassano*, 189 F.R.D. 83 (S.D.N.Y. 1999), the court held that the production of a document without looking at it demonstrates a lack of care sufficient to constitute the waiver of any applicable privilege. Accordingly, an attorney who fails to take reasonable care and precaution to prevent inadvertent disclosure may find, as a matter of substantive law, that any applicable privilege is waived.

Choice (D) is incorrect because, even though the privilege was waived by careless disclosure, Attorney Beta is not relieved of the ethical duty under Rule 4.4(b) to promptly notify Alpha of the document's disclosure.

Choice (B) is incorrect because, even though it may have been, in part, the work product of Attorney Alpha which was inadvertently disclosed, Beta's ethical obligation is simply to promptly notify Alpha of the document's disclosure.

Note that other laws may create additional obligations for a party who receives documents that are inadvertently disclosed. *Rule 4.4 annot. (2011)*. For example FRCP 26(b)(5)(B) identifies the responsibilities of a lawyer who receives material subject to a claim of privilege, and FRE 502(b) provides that inadvertent disclosure does not waive the lawyer-client privilege or attorney work-product privilege if the attorney took reasonable steps to prevent inadvertent disclosure and promptly to steps to respond to the inadvertent disclosure. *Id.*

Answer to Question 29

(B) - CJC Section 3.7(A)(4) permits a judge to appear or speak at an event that serves a fundraising purpose "only if the event concerns the law, the legal system, or the administration of justice." Similarly, CJC Section 3.7(A)(2) permits a judge to solicit funds from "members of the judge's family or from judges over whom the judge does not exercise supervisory or appellate authority." Since the facts state that the judge was a newly appointed appellate judge, it may be safely assumed that the judge had no supervisory authority over the other appellate judges. Thus, choice (B) is the best answer.

Answer to Question 30

(C) - The ABA has concluded that it is not an ethical violation to assert a valid claim, even if it is barred by the statute of limitations. Therefore, the choice (C) is the best answer, and choice (A) is incorrect. Moreover, the threat of a valid claim is not improper, so choice (B) is not correct. That the attorney did not charge a fee is not relevant to the issue of whether his conduct was ethically proper. Thus, choice (D) is not correct.

Answer to Question 31

(B) - Rule 4.2 prohibits a lawyer from "knowingly" communicating with a party represented by another lawyer when the communication is made in the course of "representing a client." Rule 4.2, however, does not "preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter." *Rule 4.2 cmt. 4*. Thus, when a lawyer is not "representing a client" in a matter, but rather is contacted by and provides a represented party with a second opinion, as in these facts, Restatement of the Law Governing Lawyers, Third, Section 99 Comment b states that no ethical violation occurs. When the lawyer does not represent a party in the matter, there is no danger of overreaching, misrepresentation, or a loss of secrets or confidences.

The fee arrangement, however, is unethical because a contingent fee is not permissible in a criminal case. *Rule 1.5(d)(2)*. Thus, choice (B) is the correct answer.

Answer to Question 32

(B) - To prevail on a claim for legal malpractice based upon a lawyer's failure to timely commence an action within the statute of limitations, the plaintiff must show not only that the lawyer was negligent, but that the lawyer's negligence proximately caused the plaintiff's resulting damages, i.e., the plaintiff would have recovered damages from the original defendant-tortfeasor on the merits of plaintiff's claim. Therefore, choice (D) is not correct because the attorney's failure to timely commence the widow's action does not "automatically" result in tort liability to the widow, but it does subject that attorney to discipline under the Rules.

In that regard, Rule 1.3 mandates that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Allowing the statute of limitations to expire, thereby precluding the client's claim, is not acting with "reasonable diligence and promptness" as required by this Rule. "Unfortunately, as in most human endeavors, neglect, procrastination and non-accomplishment are present in the legal profession. But, in the legal profession, neglect produces a particular pernicious consequence, and it is for this reason that the Disciplinary Rules ... proscribe such conduct." *Matter of Walton*, 431 N.E.2d 474 (1981). Thus, choice (B), which subjects the attorney to discipline, is correct. Choice (A) is incorrect because there is no such 30-day rule.

Answer to Question 33

(D) - Rule 5.7 creates a rebuttable presumption that the rules of legal ethics (conflict of interest, confidentiality, etc.) apply whenever a lawyer performs law-related services for the client such as legislative lobbying, sale to the client of insurance, financial planning, or participation in a mediation practice. This presumption, however, will not govern the lawyer's ancillary business activities with a client if the lawyer advises the client that the ancillary business is kept separate and distinct from the law practice and the client understands that the services provided are not legal services protected by the attorney-client relationship. Thus, choice (D) is correct.

Legislative lobbying is not the practice of law and can be engaged in by either lawyers or nonlawyers. Thus, choice (B) is not correct.

Since the rules of ethics do not apply to the law-related services in this problem, no informed written consent is needed to cure any conflict. Thus, choices (A) and (C) are incorrect because the rules of ethics, including conflicts of interest, do not apply to ancillary business when the client is made aware of this fact.

Answer to Question 34

(B) - The key to answering this question is the lawyer's obligation imposed under Rule 1.4. That rule states that a lawyer shall:

- (I) reasonably consult with the client;
- (II) keep the client reasonably informed about the status of the matter;

- (III) promptly comply with reasonable requests for information; and
- (IV) explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Thus, only “reasonable” communication is required. In that regard, the attorney was not required to return the client’s incessant phone calls after explaining that the case must await further word from the court before it can go forward. Thus, choice (B) is correct and choice (C) is not.

This is also not a case where the attorney failed to respond to reasonable phone calls and reasonable requests for information. A lawyer, even a busy one, has a duty to respond to reasonable client requests, but advising the client that a lawyer would not directly communicate with the client is not improper. Thus, choice (A) is not the best answer. Finally, the attorney’s secretary’s communication with the client is not legal in nature. Thus, choice (D) is incorrect.

Answer to Question 35

(B) - A lawyer’s *willful* failure to file a tax return reflects adversely on the lawyer’s fitness to practice law. *Attorney Grievance Comm’s v. Casalino*, 644 A.2d 43 (Id. 1994); *Rule 8.4 cmt. 2*. Thus, choice (B) is the best answer.

Choice (A) is not the best because Rule 8.4 does not differentiate between felonies and misdemeanors; instead, it proscribes generally any criminal act that adversely reflects a lawyer’s honesty, trustworthiness, and fitness as an attorney. Choice (C) is not the best choice because the law mandated a timely filing which the attorney consciously disregarded.

Clearly, choice (D) is incorrect because a lawyer is subject to the Rules seven days per week, 24 hours per day whether or not his or her conduct involves the practice of law. For example, Bill Clinton was disbarred for conduct (misrepresentation) that had nothing to do with the practice of law.

Answer to Question 36

(A) - Rule 1.15(a) mandates that client funds be kept separate and not be used by the attorney for any personal purpose. Here, the attorney is guilty of the conversion of client funds. In most states, this is an automatic basis for disbarment. *In re Noonon*, 506 A.2d 722 (N.J. 1986); *In re Miller*, 86 A.D.2d 344 (1st Dep’t 1982). The facts that the attorney promptly returned the funds, he did not have a criminal intent, and no harm was caused are irrelevant here. Thus, choice (A) is correct and choices (B), (C) and (D) are incorrect.

Answer to Question 37

(A) - A lawyer is prohibited from recommending his or her services face-to-face or directly and personally over the telephone to a lay person who has not sought the attorney’s legal advice when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain. *Rule 7.3(a)*. The United States Supreme Court has upheld the prohibition against in-person

solicitation because of the inherently injurious nature of such speech. Thus, choice (D) is incorrect.

Unlike a letter or television advertisement which simply provides information that can be disregarded, face-to-face or direct phone or email solicitation by an attorney can exert pressure on the prospective client in part because it frequently demands an immediate response without providing an opportunity for the client to compare or reflect. Thus, choice (C) is incorrect. Here, the attorney is subject to discipline because he violated Rule 7.3(a). The fact that the woman did not suffer any specific harm is of no importance. Thus, choice (A) is correct and choice (B) is not correct.

Answer to Question 38

(B) - This question involves an inexperienced lawyer whose performance fell below professional norms. We know that a lawyer's lack of experience in a particular area is no defense to a charge of incompetent representation; the inexperienced lawyer is ethically expected to either work with experienced co-counsel or to educate himself or herself appropriately. Failure to do so subjects the lawyer to discipline. *Rule 1.1 (Competence)*.

However, this question does not ask whether the attorney is subject to discipline. It asks whether and on what basis the attorney is subject to legal malpractice liability. The Preamble to the Model Rules states that "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in a case that a legal duty has been breached.... Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standards of conduct."

The attorney's failure to tell the wife of his lack of experience did not give rise to civil liability. Thus, choice (A) is not the best answer. In order to establish legal malpractice, a plaintiff must plead and prove (1) that a duty was owed (the legal competence of a reasonable prudent attorney), (2) that the duty owed was breached (the attorney did not inquire as to the other spouse's pension benefits although it was an area that was always inquired about by reasonable attorneys), and (3) that the breach of the lawyer's duty proximately caused the client damages (here \$150,000). Because the attorney failed to act as a reasonably prudent attorney in neglecting to inquire into the husband's pension benefits, and the wife suffered a loss of \$150,000 as a direct result of that failure, the attorney is civilly liable for his malpractice. Thus, choice (B) is correct.

Although it is true that strict tort liability is not imposed on lawyers, choice (C) is not correct because the elements of negligence (legal malpractice) are evident from the facts rendering the attorney liable for civil liability.

Simply because a client is satisfied with the final outcome of a case does not relieve the attorney from a claim for legal malpractice. Thus, choice (D) is not correct.

Answer to Question 39

(A) - Even though the attorney's fee is being paid by the insurance company, the insured is the attorney's client and the party to whom the attorney owes his undivided loyalty. Because the attorney must preserve the confidences of his client (the insured), the attorney may not disclose his insurance coverage concerns to the insurance company without the insured's consent after full disclosure of such revelations. *A.B.A. Informal Op.* 1976 (1981).

"Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. *See also Rule 5.4(c)* (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another)." *Rule 1.8 cmt. 11*. Because the attorney owes her loyalty to the insured, choice (A) is correct.

Answer to Question 40

(B) - The A.B.A. Annotated Rules (Rule 5.1) state that "a lawyer who delegates responsibility to subordinates is required to provide reasonable supervision of their activities.... Under ABA Model Rule 5.1 a failure to provide reasonable supervision is a distinct transgression of professional obligations." The Official Comment to Rule 5.3 states, "[t]he measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline." *Rule 5.3 cmt. 1*. Here, the attorney is subject to discipline if he failed to reasonably supervise the secretary's work. Thus, choice (B) is correct.

There is no rule in the Model Rules of Professional Conduct that provides that a lawyer is automatically subject to discipline if a malpractice judgment is obtained. Thus, choice (A) is not the best choice. There is, likewise, no Rule prohibiting disciplinary action in addition to a simultaneous malpractice action. Thus, choice (D) is not the best choice. Finally, that similar mishaps occur to other lawyers is not a valid excuse for an attorney's ethical violations, and, accordingly, choice (C) is incorrect.

Answer to Question 41

(A) - Here Alpha impermissibly sought to offer evidence by means prohibited by law. *Rule 3.5(a)*. In essence, Alpha is engaging in extortion (blackmail), which is compelling a person to perform an act by a threat to disclose a false or truthful fact that would cause the person embarrassment, disgrace, or humiliation in the eyes of the public. Furthermore, Rule 3.3 prohibits a lawyer from offering a witness an inducement prohibited by law. Thus, choice (D) is incorrect and choice (A) is correct.

Choice (C) is a truthful statement, but it is not responsive to whether Alpha's threat is improper. Choice (B) simply is wrong and irrelevant to whether an attorney's use of extortion to obtain a witness's testimony is ethically proper.

Answer to Question 42

(B) - During litigation a lawyer may not make a false statement of law or fact. The lawyer also may not interject personal opinions (e.g., personal beliefs that a client is innocent or that a witness is telling the truth or lying) or personal knowledge of facts. Thus, statements III and IV are improper. However, the lawyer may argue the evidence for a position or conclusion with respect to matters stated at the trial. *Rule 3.4*. Thus, the government's lawyer may properly point out contradictions and witness bias in his summation. Statements I and II are proper, and choice (B) is the best answer.

Keep in mind that Rule 3.4(e) states that a lawyer "shall not ... allude to any matter the lawyer does not reasonably believe is relevant or that will not be supported by substantial evidence." Thus, in a summation, an attorney should avoid reference to irrelevant or inadmissible evidence.

Answer to Question 43

(C) - As long as the attorney maintains a direct relationship with the client and supervises any delegated work for which the lawyer remains ultimately responsible, a lawyer may delegate authority to a nonlawyer in the lawyer's office. Thus, a law student may properly draft for attorney review legal documents and interview witnesses, but the law student's responsibilities must be limited to those functions not involving independent discretion or legal judgment. Here, the law student's drafts and her interviews are proper functions.

Rules 5.3(a) and (b) state that with respect to nonlawyers employed, retained by, or associated with lawyers, the lawyer having managerial and direct supervisory authority "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."

Rule 5.3(c) further states that, "[a] lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Accordingly, if the law student is settling claims with the attorney's consent, whether

before a suit is commenced or after, she is impermissibly engaging in the practice of law and the attorney, who is aware of this fact, is subject to discipline. Thus, choice (C) is correct.

Answer to Question 44

(B) - A lawyer shall not take on legal matters that the lawyer knows the lawyer is not competent to handle. However, if the lawyer expects to become competent without delay or expense to the client, he or she may undertake the matter. *Rule 1.1 cmt. 4*. Thus, the correct answer is choice (B). Choice (C) is not correct because, even if no other lawyer in the area could handle the matter, the attorney cannot represent the inventor unless he can do so competently.

Answer to Question 45

(C) - In 2002, a new exception allowing disclosure of confidential information was added to Rule 1.6 permitting disclosure “to secure legal advice about the lawyer’s compliance with these Rules.” *Rule 1.6(b)(2)*. Although such disclosures are frequently implied, this amendment made clear that they are permitted “because of the importance of a lawyer’s compliance with the Rules.” *Rule 1.6 cmt. 7*. Thus, choice (C) is correct.

Answer to Question 46

(D) - A lawyer cannot alter, destroy, or conceal material evidence. *Rule 3.4(a)*. Such conduct in many jurisdictions is a criminal offense (the crime of hindering prosecution or obstruction of justice). “Applicable law may permit a lawyer to take temporary possession of physical evidence of a client’s crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.” *Rule 3.4 cmt. 2*. Thus, if the applicable law permits the attorney to test this type of evidence, the attorney will not be subject to discipline, and choice (D) is the best answer.

Answer to Question 47

(B) - A client is free to discharge an attorney at any time without cause and cannot be compelled to pay damages for the breach of a retainer agreement. However, an attorney discharged without cause is entitled to a fee based on *quantum meruit*. The elements outlined in Rule 1.5(a) and the Pieper Mnemonic “**RENT A SERF**” should be considered in determining the reasonableness of that fee. Thus, if the retainer represents a reasonable value for the attorney’s services, choice (B) is correct.

Rule 1.5(b) recommends that a fee arrangement “preferably” be in writing. Rule 1.5(c) mandates a writing signed by the client for a contingency fee arrangement, but no such arrangement exists here. Thus, choice (D) is not the best choice. In addition, there is no forfeiture rule applicable here, so choices (A) and (C) are incorrect.

Answer to Question 48

(B) - As a general rule, a lawyer cannot share a fee with another lawyer unless that lawyer performed work or assumed joint responsibility (financial and ethical) on the matter. One exception to the rule is that partners in a firm may share fees regardless of the work performed by each. Thus, choice (D) is incorrect. A further exception to the rule is that payment to a former partner or associate pursuant to a retirement agreement, as here, is not prohibited. *Rule 5.4(a)*. Thus, choice (C) is incorrect. Here, when the partner was discharged, her buy-out compensation could be based on a percentage of her preceding year's salary and could be paid out of fees subsequently earned by the firm. *Rule 1.5 cmt. 8*. Thus, choice (B) is better than choice (A), which is more general and not directly tied to the ethical issues presented in this question.

Answer to Question 49

(D) – “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” *Rule 1.1*. However, this requirement is relaxed somewhat in emergency situations. “In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral, consultation, or association with another lawyer would be impractical.” *Rule 1.1 cmt. 3*. Here, because she rendered advice to a client in an emergency (i.e., she only had four minutes to make her decision), the attorney's rendering of adequate, incompetent, and/or deficient advice to her client will not subject her to discipline. Choice (D) is the best answer.

Answer to Question 50

(D) - Turning down a CLE request for assistance will never subject a lawyer to discipline because there is no ethical rule mandating CLE presentation. Rule 6.4 states that a lawyer may engage in law reform activity, but does not mandate such conduct. Even if the professor has not completed his *pro bono* obligation for the year, he still will not be “subject to discipline” if he declines the CLE request. Thus, choice (C) is not correct.

This question involves the aspirational goals of the Rules. Rule 6.1 recommends that lawyers render 50 hours of public interest legal service per year. A lawyer may discharge this responsibility by providing professional services at no fee or a substantially reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system, or the legal profession, and by financially supporting organizations that provide legal services to persons of limited means.

A substantial majority of the 50 hours of legal services should be provided without fee or expectation of being paid a fee to persons of limited means or to charitable, religious, civic, community, governmental, and educational organizations that address the needs of persons of limited means. The balance of the 50 hours can be satisfied by:

- (A) Delivery of legal services to any individual at no fee or a substantially reduced fee;
- (B) Bar Association or continuing legal education tasks; or

- (C) Reduced fees (as opposed to free legal services) to persons of limited means.

Here, choice (D) is the best answer because the Rules urge lawyers to engage in this type of conduct to the extent that it does not interfere with other ethical obligations, but it does not make the *pro bono* mandatory. The *pro bono* requirement of 50 hours under Rule 6.1 is aspirational only, and is not intended to be enforced through the disciplinary process. Moreover, while a lawyer should not decline a court appointment, a lawyer may decline a Bar Association request without being “subject to discipline.”

Answer to Question 51

(B) - Under Rule 1.2(a) a lawyer “shall abide by a client’s decisions concerning the objectives,” and as required by Rule 1.4 “shall consult with the client as to the means by which they are to be pursued.” The attorney is subject to discipline for failing to abide by the client’s clear directives. Thus, (B) is the best answer.

Also, Rule 1.4(a) imposes an ethical duty on a lawyer to “reasonably consult with the client about the means [of securing the client’s loan] by which the client’s objectives are to be accomplished” and “keep the client reasonably informed about the status of the matter.” Again, the attorney is subject to discipline for failing to adhere to these requirements.

Whether the client ultimately suffers any financial loss because only a second mortgage secured the client’s loan is irrelevant on whether the attorney is subject to discipline. Thus, choice (A) is incorrect. The client’s financial loss would be relevant in a question asking about whether the attorney is subject to civil liability (legal malpractice for his conduct).

In addition to the Rule 1.2 requirement that the lawyer abide by the client’s objectives, Rule 1.4’s requirement that the lawyer must “consult with the client” about the means by which the objectives are pursued must be considered. Because the attorney did not consult the client, even if the attorney honestly believed that the client’s objectives would be served by a relaxation of the investment parameters, choice (C) is incorrect.

Rule 1.2 states, “A lawyer shall act with reasonable diligence and promptness in representing a client.” Just because the attorney satisfied this requirement would not otherwise excuse his contradicting the client’s direct instruction to only secure the loan with a first mortgage. Thus, choice (D) is not correct.

Answer to Question 52

(B) - The American Bar Association’s Standing Committee on Ethics and Professional Responsibility has advised the bar that misconduct must be reported even if it involves activity completely removed from the practice of law. Thus, choice (D) is not correct. *A.B.A. Formal Op. 04-433 (2004)*. The committee noted that the obligation that Rule 8.3(a) implements (the reporting of other lawyer’s misconduct) is a quid pro quo for the bar’s privilege of self-regulation. Thus, even though Alpha’s misconduct is unrelated to the practice of law, it may nevertheless violate professional conduct rules.

The most serious type of misconduct is criminal activity. Under Rule 8.4(b), criminal conduct constitutes professional misconduct if it “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” whether or not the lawyer is ever convicted or even charged. Thus, choices (A) and (C) are incorrect. The Committee in its ethics opinion gave examples of offenses outside the practice of law that have been found to violate Rule 8.4(b). It listed stalking, harassing, willfully failing to file a tax return, alcohol and drug crimes, sex crimes, and crimes of violence including domestic violence. Even minor crimes, if repeated, can indicate an indifference to legal obligation.

Moreover, non-practicing lawyers, like practicing lawyers, may be disciplined for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Thus, Rule 8.4(c) reaches any activity or aspect of a lawyer’s personal life and addresses a broad range of behavior that may or may not be criminal in nature. As examples, the Committee mentions fraudulent insurance claims and purposeful misstatements on applications for employment, credit or insurance.

Before a reporting obligation arises, a lawyer first must “know” of the violation. Whether or not the requisite knowledge exists is determined by an objective standard. Second, Rule 8.3(a) requires reporting only if the violation raises a “substantial question” as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. “Substantial” refers to the seriousness of the misconduct and not to the quantum of evidence known by the lawyer who is weighing his or her duty to report. Criminal conduct often raises a substantial question about the lawyer’s fitness.

The effect of Rule 1.6 (confidentiality) when read together with Rule 8.3 is that, if reporting another lawyer’s misconduct would reveal information relating to a client’s representation, the lawyer must obtain that client’s informed consent to make the misconduct report. Stated more bluntly, Rule 1.6 trumps Rule 8.3. Therefore, if the information necessary to report Alpha’s misconduct is protected by Rule 1.6, the lawyer should discuss the matter with the client. Such discussion should include an analysis of how the disclosure might adversely impact the client. Thus, choice (B) is the correct choice.

Answer to Question 53

(A) - Rule 1.8(g) states that “[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against clients ... unless each client gives informed consent, in writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims ... involved ... of each person in the settlement.” Because full disclosure to his client was lacking, plaintiff’s attorney is subject to discipline, even though his client consented in a signed writing. Thus, choice (C) is incorrect and choice (A) is correct.

The fact that the mandatory full disclosure might be used to another client’s disadvantage (possibly lowering an amount originally offered to one of Alpha’s other clients) is irrelevant, because Rule 1.8(g) mandates full disclosure to each client in order for each client to make an informed consent. Therefore, choice (B) is incorrect.

Under Rule 1.2(a), each client has the right to finally decide whether to accept or reject an offer of settlement. In order for a client to do so knowingly, the lawyer must advise each of the multiple clients about all the material terms of the settlement, the extent of each client's injuries, and what other clients will receive (or, when representing multiple defendants, what each client will pay). This detailed information must be disclosed among all plaintiffs and cannot be hidden behind the cloak of confidentiality. Thus, choice (D) is not correct.

Answer to Question 54

(B) - The violation of a Rule should not by itself give rise to a cause of action against a lawyer, as the Rules are not designed to be a basis for civil liability. Thus, choice (A) is not correct. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of a breach of applicable standard of conduct.

The Preamble and Scope [2] of the Model Rules and the Annotations to the Preamble and Scope state that "it is well recognized that a breach of fiduciary duty can be grounds for denying a lawyer's fees." *Rules Preamble and Scope annot. at 9 (2003)*. Indeed, courts can deny fees even if there has been no harm to the client. Thus, choice (B) is correct and choice (C) is not correct. The forfeiture, however, is not automatic or total, and there are many factors that will be considered by the court.

Note that the extra-disciplinary application of the Rules goes beyond malpractice, disqualification and fees. *Restatement (Third) of the Law Governing Lawyers § 6 (2000)*, lists 13 judicial remedies available when a lawyer "breaches a duty" to a client or non-client. *See id. at § 37 (Fee Forfeiture as a Remedy for Ethical Violation)*; *see also* Rotunda, *Legal Ethics* 9-8 at 290 n.3 (2003); *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (fee forfeiture appropriate remedy for violation of aggregate settlement rules); *see generally, supra, Chapter II.E.10*.

"[M]ost courts . . . look to the ethics rules as evidence of standards of conduct and care, particularly in actions for legal malpractice or breach of fiduciary duty." *Rules Preamble and Scope annot. at 7 (2011)*. *Restatement (Third) of the Law Governing Lawyers § 52(2)(c)* and its comments state that a rule violation "may be considered by a trier of fact as an aid in understanding and applying" the duties of competence and diligence required to meet the standard of care.

While it is true that there is no separate cause of action for ethical malpractice (as opposed to legal malpractice), choice (B), permitting clients to recover the fee paid is the best answer.

Answer to Question 55

(B) - An attorney may agree not to reveal the terms of a settlement, but may not "participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." *Rule 5.6(b)*. Although, both the new and former attorneys would be subject to discipline for entering such an

arrangement, the question asked only about the former attorney. Since the former attorney participated in “offering or making” the restrictive covenant on the new attorney’s right to practice, the former attorney is subject to discipline. Even though provision I would not subject the former attorney to discipline (lawyers can properly agree not to disclose the terms of a client’s settlement), provision III subjects the former attorney to discipline.

Provision II also subjects the former attorney to discipline. In the Reporter’s Note to Restatement (Third) of the Law Governing Lawyers § 116, the Reporter cites *In re Boothe*, 740 P.2d 785 (Or. 1987) prohibiting a lawyer from obstructing another party’s access to a witness. In the *Boothe* case, attorney Boothe was disciplined for conditioning an offer to settle a dispute with Boothe’s client on the client’s promise not to testify against the lawyer in any subsequent disciplinary proceeding.

Rule 3.4, labeled “Fairness to Opposing Party and Counsel,” states that a lawyer “shall not request a person ... to refrain from voluntarily giving relevant information to another party.” Rule 3.4(f)’s exception to this rule (instructing the lawyer’s current client or the client’s employees or relatives) does not apply to the facts arising under this problem. Thus, choice (B) is the correct answer.

Answer to Question 56

(D) - CJC Section 2.9 directs that a “judge shall not initiate, permit or consider *ex parte* communications or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending matter.” There are, however, several exceptions to this rule, one of which is that a judge may freely consult with court personnel (e.g. a law clerk) or with other judges, “provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.” *CJC §2.9(A)(3)*. Thus, choice (D) is correct and (A) is incorrect.

Choice (B) is incorrect because there is no requirement to disclose this permitted *ex parte* communication. CJC Section 2.9(B) requires a judge who “inadvertently receives unauthorized *ex parte* communication bearing on the substance of a matter” to promptly “notify the parties of the substance of the communication and provide the parties with an opportunity to respond,” but this communication was authorized.

The only time the consent of both parties is required is where the judge attempts to confer separately with the parties and their lawyers in an effort to mediate or settle a matter pending before the judge. *CJC §2.9(4)*. Thus, choice (C) is not correct.

Answer to Question 57

(B) - A lawyer may, on the recommendation of a potential will beneficiary (here, Save-the-Children Charity) draft the testator’s will provided Rule 5.4(c) is satisfied. Rule 5.4(c) says that a lawyer shall not permit a person who recommends, employs or pays the lawyer’s fee to

render legal services for another (the donor) to direct or regulate the lawyer's professional judgment in rendering such legal services.

If a potential beneficiary or other interested party (the charity) recommends a lawyer and also agrees to pay the lawyer's fee, then the testator's (donor's) informed consent to the arrangement must be obtained and the other requirements of Rule 1.8(f) satisfied (no interference by the charity with the donor-attorney relationship, the attorney must not allow the charity to interfere with the attorney's independent professional judgment, and confidential information must not be revealed to the charity without the donor's informed consent). *See also Rule 1.6.* Choice (B) is better than choice (A) since not only must the donor's informed consent be obtained, but the attorney must "exercise independent professional judgment and render candid advice to the donor." *Rule 2.1(a).*

When the charity pays the attorney's fee, it raises the concern that the charity might expect the attorney to consider or champion its interest when advising the donor concerning her estate. This expectation should be dispelled by a frank discussion with the charity in which the attorney explains that he represents the donor and must exercise independent professional judgment on behalf of the donor and protect her confidences. The attorney should also explain to the charity the need to attain the donor's informed consent to the arrangement. In that regard, Rule 1.4(b) states that a "lawyer shall explain a matter to a client to the extent necessary to permit the client to make informed decisions regarding the representation."

This reasoning also applies to a lawyer who is recommended by a potential beneficiary to draft a will for a relative. *See A.B.A. Formal Op. 02-428 (2002).*

Answer to Question 58

(C) - Restatement (Third) of the Law Governing Lawyers Section 116(2) clearly states that "[a] lawyer may not unlawfully obstruct another party's access to a witness." Rule 3.4(f) states that a lawyer shall not "request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent of a client [defendant's mother clearly fits within this category]; and
 - (2) the lawyer reasonably believes that person's interests [defendant's mother] will not be adversely affected by refraining from giving such information."
- Restatement (Third) of the Law Governing Lawyers Section 116(4) is in accord.

Here, the attorney asked the defendant's mother not to cooperate with the prosecution's investigation of her son's crime. While this is permissible because she is the relative of the attorney's client, the attorney also must reasonably believe that the defendant's mother will not be adversely affected by refusing to speak to the prosecutor's office. Thus, if the attorney believed that the mother's interests were not at risk, the attorney will not be subject to discipline, and choice (C) is correct.

A lawyer can always instruct his or her own client to refrain from voluntarily offering

information to another party, but the defendant's mother is not the attorney's client; the defendant is the client. As Restatement (Third) of the Law Governing Lawyers Section 116 Comment e states, "For purpose of this rule, a victim or witness is not a client of the prosecutor [or the Attorney]." *Id. at 208*. Thus, choice (C) is correct and not choice (D).

Choice (B) is not correct because the facts do not indicate that there was any attempt by the attorney to improperly influence the witness.

Answer to Question 59

(C) - Ordinarily, a lawyer in government service must not negotiate for private employment with a party or law firm involved in a matter in which the government lawyer is then participating personally and substantially. *Rules 1.11(c)(2) and 1.12(b)*. However, law clerks seeking private employment are treated differently than other government employees.

A special rule provides that a law clerk may negotiate for employment with a party or lawyer even though the law clerk is substantially and personally involved in the matter, but the law clerk first must inform the judge. "Rule 1.12(b) makes special provision for judicial clerks, who are expected to be thinking about their employment prospects. Judicial clerks may negotiate for employment even with those involved in the matter in which they are participating personally and substantially, as long as they notify their judges. They are not required to notify others involved in the matter." *Rule 1.12 annot. (2011)*.

Note that if the law clerk leaves his judicial clerkship and goes to Bravo's firm, Bravo's firm would then be disqualified by imputation (since the law clerk would be disqualified) unless the law clerk is "screened at the law firm" from working on the strip-mining case. *Rule 1.12(c)*.

Answer to Question 60

(B) - A.B.A. Formal Opinion 02-425 (2002), fully discussed this issue, which has been addressed on the MPRE. The A.B.A. Committee on Ethics approved the inclusion in retainer agreements of provisions requiring binding arbitration of disputes concerning legal fees and legal malpractice, provided clients are fully apprised of the advantages and disadvantages of arbitration, and the clients give their informed consent to the inclusion of the arbitration clause in the retainer agreement. Thus, choice (B) is correct, and choices (C) and (D) are incorrect.

Rule 1.4(b) further provides that a "lawyer shall explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation." Thus, the advantages and disadvantages of arbitration must first be fully explored with the client.

In addition, Rule 1.8(h) prohibits a lawyer from prospectively agreeing with a client to limit the lawyer's legal malpractice liability unless such an agreement is permitted by law and the client is represented by independent counsel. "Commentators and most state bar ethics committees have concluded that mandatory arbitration provisions do not prospectively limit a lawyer's liability, but instead prescribe a procedure for resolving such claims." *A.B.A. Formal Op. 02-425 (2002)*; 2 *G.C. Hazard & W. W. Hodes, The Law of Lawyering* §12.18 at 12-50 (3d

ed. 2001). Thus, choice (A) is incorrect. Whether the arbitration is binding or not, the duty remains to fully inform the client to allow the client to give informed consent. Thus, choice (D) is neither relevant nor correct.

PIEPER

**MULTISTATE
PROFESSIONAL
RESPONSIBILITY
EXAM III**

You have two hours and five minutes to complete the following sixty simulated MPRE questions.

EXAM INSTRUCTIONS

The following practice exam consists of sixty (60) multiple choice questions for which you have two hours and five minutes to complete. Though some questions may take you longer than others, the exam allots you an average of two and a half minutes per question. Manage your time carefully. If you spend too much time on one or more challenging questions, you may have difficulty completing the exam.

A brief factual scenario precedes each question. Read each scenario and the words of the question carefully. Then, evaluate the four answer choices provided. You should select the **best** answer from the choices provided.

All of your selected answers should be based on your knowledge of the disciplinary rules of professional conduct currently articulated in the American Bar Association (ABA) Model Rules of Professional Conduct, the ABA Model Code of Judicial Conduct, controlling constitutional decisions, generally accepted principles established in leading federal and state cases, and in procedural and evidentiary rules. To the extent that questions of professional responsibility arise in the context of procedural or evidentiary issues, such as the availability of litigation sanctions or the scope of the attorney-client evidentiary privilege, the Federal Rules of Civil Procedure and the Federal Rules of Evidence will be assumed to apply, unless otherwise stated. This exam is not meant to test your personal ethical beliefs and values.

Record each of your answers on one of the answer sheets provided on the page following this exam. You will receive no credit for any answers or other markings made in the exam booklet. You will only receive credit for correct answers marked on your answer sheet. You will not be given any additional time to transcribe any of your answers from the exam booklet to your answer sheet.

If you do not know the answer to a question, you should choose an answer at random (guess) and record that answer on your answer sheet. Your score is based on your total number of correct answers, and there is no penalty for incorrect answers. Guessing when you do not know an answer will not hurt your score and may actually improve it, so record an answer for each of the sixty questions.

You may only select one answer choice on your answer sheet. If two answer choices are marked you will receive no credit, even if one of your choices was the correct answer.

Question 1.

An attorney represented a client who was awaiting the outcome of a secret bid she had placed to buy 60 acres on the south side of a major highway. The client planned to construct an amusement park on the land.

In the meantime, an entrepreneur approached the attorney to have the attorney form a corporation and to assist him in purchasing a plot of land on which to build a restaurant. The entrepreneur is considering several locations, one of which is adjacent to the attorney's client's proposed amusement park site.

Without revealing the client's name, the attorney advises the entrepreneur of the potential amusement park project and suggests that he consider this information when choosing a property to buy for the restaurant.

Is the attorney subject to discipline for this conversation with the entrepreneur?

- (A) Yes, because the attorney revealed a client's confidence without permission.
- (B) Yes, but only if the client told the attorney not to reveal the information.
- (C) No, because the attorney obtained no personal benefit.
- (D) No, because the attorney did not disclose the client's identity.

Question 2.

In an effort to expand his business, an attorney placed the following advertisement to be broadcast on the radio:

"I engage in the general practice of law, with a concentration on personal injury plaintiff work. In negligence actions I work on a contingent fee. You will recover any proceeds I collect less my one-third contingent fee after deducting any necessary expenses from the total amount recovered. The first consultation is free."

Is the attorney's advertisement proper?

- (A) No, because the attorney advertised that he offers contingent fees.
- (B) No, because the attorney advertised that his first consultation is free.
- (C) Yes, if the attorney a certified specialist in negligence.
- (D) Yes, because it is not false or misleading.

Question 3.

An employer suspected his employee of stealing inventory from the company warehouse. On the advice of his attorney, the employer told the employee to report to the front office at 10:00 a.m. the following day.

Prior to the meeting, the employer spoke with his attorney and the two decided to bring a lawsuit against employee. Without disclosing that fact to the employee, the employer and attorney interrogated the employee for about one hour during the meeting.

Was this action by the attorney proper?

- (A) Yes, if the attorney was not aware that the employee was represented by counsel.
- (B) Yes, as long as the attorney was not a state prosecutor.
- (C) No, because an attorney cannot ethically communicate with an adverse party.
- (D) No, because the decision had already been made to file suit, so the attorney could not interrogate the employee.

Question 4.

An insurance company hired an attorney to investigate suspicious claims filed by the company's insureds. In one matter, an insured of the insurance company filed a claim stating that he had fallen down some stairs and been injured. The insured claimed that he could not walk, and the insurance company was paying him for his lost wages.

Last week, while investigating the insured's claim, the attorney saw the insured playing basketball at a park near his house. The attorney joined the game believing that, if she befriended the insured, she could record some damaging admissions against him on her miniature recording device.

After the insured made a few damaging statements, he realized that something was afoot. He asked the attorney if she was investigating the insurance claim or recording their conversation. The attorney responded, "no, and none of this would be admissible against you, anyway." The next day, the attorney filed a complaint on behalf of the insurance company against the insured that included several of the insured's recorded statements.

Was the attorney's conduct proper?

- (A) Yes, because the attorney had no duty to the insured.
- (B) Yes, because deception may be used to combat fraud.
- (C) No, because the insured was not represented by counsel.
- (D) No, because of the attorney knowingly made a false statement.

Question 5.

The League of Women voters held a debate among the three female candidates for a heavily contested public election to the state appellate court. Prior to the debate, each candidate filled out a position card setting forth her position should she be elected.

One judicial candidate's pledge card states that she will judge fairly and impartially, she will support efforts to obtain increased funding for the judiciary to improve court administration to reduce the court's backlog, and she will oppose any method of flag desecration that comes before the appellate court.

Is the judicial candidate's pledge proper?

- (A) No, because criticism of current court administration undermines the public's faith in the judicial system.
- (B) No, because a judicial candidate should not suggest that she will rule in a predetermined way.
- (C) Yes, if she carries out all of her promises.
- (D) Yes, if the promises reflect her true beliefs.

Question 6.

An attorney serves as the mayor of the small city in which she lives. As mayor, it is her responsibility to determine whether suggested legislation will be taken up for consideration by the city council.

The attorney's firm represents a real estate venture in the city. The city council recently proposed legislation that would have an adverse effect on the real estate venture's development within the city. The real estate venture's annual fishing party for local clients and politicians is coming up. No business is ever discussed at these parties. The attorney intends to attend the fishing party.

Is the attorney's attendance proper?

- (A) No, not under any theory.
- (B) No, if the real estate venture plans to influence the attorney.
- (C) Yes, if the attorney refrains from doing legal work for the real estate venture.
- (D) Yes, if the real estate venture avoids discussions with the attorney.

Question 7.

After being groundlessly sued by a client for malpractice, an attorney put in place the following system: once she completes work on a client's case, with the client's consent, she video records with the client a discussion recounting all aspects of the case and informing the client of every decision made and the reasons for making each. She then asks the client if the client understands every aspect of the representation and whether the client has any further questions.

Is the attorney's system proper?

- (A) Yes, if she follows it in good faith and fairly discusses the clients' matters.
- (B) Yes, because once the case representation is complete, the attorney-client relationship ends.
- (C) No, if she does this solely to preserve evidence.
- (D) No, because she is acting adversely to her clients' interests prior to the termination of the attorney-client privilege.

Question 8.

A celebrity consulted an attorney about a threatened paternity suit that the celebrity wished to settle. The celebrity revealed to the attorney that, while the celebrity was in Europe at the time of conception and he felt the suit was groundless, he nonetheless did not want any of this to leak out to the press.

While discussing strategy for settlement, the celebrity mentioned to the attorney that the woman recently had imported drugs into the country.

When the attorney met with the woman, who did not have a lawyer, to pursue a settlement, the attorney told the woman that "if you don't settle this paternity matter on the terms we offer, we will bring your drug importing matter to the district attorney and have a criminal action brought against you."

Was the attorney's statement proper?

- (A) Yes, if he intended to turn the matter over to the prosecutor.
- (B) Yes, if he reasonably believed that the woman committed a crime.
- (C) No, unless he was certain that a criminal statute had been violated.
- (D) No, because threats of criminal prosecution during settlement negotiations are improper when the alleged crime is unrelated to the civil matters being settled.

Question 9.

A judge presided over a four-month antitrust trial. The parties before her were adequately represented by counsel, but the legal issues in the case were intricate and the real evidence voluminous.

After the attorneys concluded their summations, the judge decided she was not satisfied with the legal arguments or briefs submitted to her. The judge contacted and obtained advice from a law school professor and well-respected expert in antitrust law. The judge considered the professor's advice in reaching her decision.

Was it proper for the judge to consider the professor's advice?

- (A) Yes, because the judge viewed as insufficient the legal argument offered by the attorneys.
- (B) Yes, provided the judge discussed the professor's advice with the attorneys and gave the attorneys an opportunity to refute that advice.
- (C) No, because it gives the appearance of impropriety, i.e., the state's judiciary is not competent to handle complicated matters before it.
- (D) No, because a judge can neither consider nor initiate any ex parte communications concerning pending matters.

Question 10.

A woman orally promised her nephew that, when she died, she would leave her house to him if he cared for her for the rest of her life. However, just prior to her death, the woman executed a will leaving the house to her friend. The will also named the friend as executor.

Upon her death, the woman had a sizable estate valued at \$500,000, including her house. The attorney for estate had witnessed the oral promise made by the woman to her nephew. The attorney's research determined that the oral contract was unenforceable due to the Statute of Frauds. The attorney feels badly for the nephew and believes that asserting the Statute of Frauds would be unfair.

What is the proper action for the attorney to take?

- (A) To not advise the friend of the Statute of Frauds defense and to proceed with distributing the estate.
- (B) To withdraw from representation of the estate because the attorney could then testify as to the existence of the oral contract.
- (C) To advise the friend of the Statute of Frauds defense and to await his instructions.
- (D) To say nothing and, as an equitable officer of the court, refrain from asserting the Statute of Frauds defense to the nephew's claim.

Question 11.

A plaintiff and defendant were embroiled in a bitter dispute over the licensing of certain products designed by the plaintiff and distributed by the defendant. The parties did not trust one another, and the litigation, which went on for years, finally reached the trial phase.

The trial took several weeks and involved countless hours of testimony and thousands of exhibits. While the jury was deliberating, one of the attorneys alerted the judge that settlement negotiations were ongoing. The judge, eager to put an end to the matter, called each party and the lawyers separately into her chambers to assist in furthering the settlement discussions.

Is the judge's conduct proper?

- (A) Yes, if the judge obtained permission of the parties.
- (B) Yes, if the jury was deadlocked.
- (C) No, because a judge shall dispose of all judicial matters promptly and competently.
- (D) No, because ex parte communications are improper.

Question 12.

In a civil case in state court, the plaintiff cited and relied upon decisions of the state's highest court that are dispositive of the issues in the case. The defendant's attorney asserted legal arguments that are directly contrary to the law set forth in those decisions.

Is the attorney subject to discipline?

- (A) Yes, because the attorney asserted a legal doctrine that is directly contrary to decisions of the state's highest court.
- (B) Yes, unless the attorney can distinguish the contrary decisions of the state's highest court.
- (C) No, because it is the attorney's duty to present all arguments that may be favorable to his client.
- (D) No, if the attorney believes in good faith that the defense has merit and the case law can be judicially modified or reversed.

Question 13.

Every year, a criminal defense attorney throws a Christmas-Chanukah-Kwanza party for the local criminal court law clerks. At the party, the attorney serves food, liquor, and other refreshments. She also holds raffles and gives out about a dozen door prizes including stereos, TV's, and season tickets to professional sporting events. The party always is the big event of the holiday season.

Is the attorney's conduct proper?

- (A) No, because the attorney is giving something of value to the law clerks with whom she will likely work on future matters.
- (B) No, if the door prizes exceed \$100 in value.
- (C) Yes, if the attorney did not personally conduct the door prize drawings.
- (D) Yes, if the attorney did not expect her actions to influence the clerks.

Question 14.

An attorney represented an alleged gang member in a criminal matter. The attorney's former law school friend represented a rival gang member, Trixie, in an unrelated criminal case.

One day at lunch, the attorney's client told the attorney, "I want you to work out a favorable plea bargain for me with the prosecutor. I know enough about Trixie to have her put away for life, and that should be worth something to the prosecutor."

The attorney knows that his client's information, if true, will ruin Trixie's criminal defense and embarrass his law school friend. The attorney decides not to say anything to warn his friend and continues to represent his client.

Is the attorney's conduct proper?

- (A) No, because he should immediately warn his friend of the information.
- (B) No, and he should withdraw from the case.
- (C) Yes, and he should continue to keep his client's information confidential.
- (D) Yes, but he may warn his friend after the discussions with the prosecutor if his friend swears to secrecy.

Question 15.

In the course of representing a world-class athlete and household name, an attorney obtained from the file of another of the athlete's lawyers a confidential settlement agreement that the athlete had entered to quietly settle a harassment suit. While the athlete had shown the agreement to several people, word of neither the allegations nor the settlement had reached the press.

That evening, the attorney showed a copy of the settlement agreement to his wife and several of her friends who were at his house for dinner. His wife and guests were well aware of the athlete, but not of the harassment charges. The attorney instructed everyone at the dinner not to repeat what they had read in the agreement, and the guests never uttered another word of it.

Is the attorney's conduct proper?

- (A) No, because he breached the attorney-client privilege.
- (B) No, because an attorney may not discuss the secrets of a client without first obtaining consent.
- (C) Yes, because this was not a secret revealed by the athlete to his attorney.
- (D) Yes, because it was previously revealed to a third person, and thus not protected by the attorney-client privilege.

Question 16.

When another lawyer with whom he shared office space became too busy, an attorney agreed to represent the other lawyer's client in connection with the purchase of a delicatessen.

The attorney handled the entire matter involving the purchase without any assistance from the other lawyer. After the delicatessen was purchased, and with the client's knowledge and written consent, the attorney paid the other lawyer a referral fee from the money he received from client. The attorney's hope was that the other lawyer would send him additional referrals in the future.

Was the referral payment from the attorney to the other lawyer proper?

- (A) Yes, but as to the other lawyer only.
- (B) Yes, but as to the attorney only.
- (C) Yes, as to both.
- (D) No, as to neither.

Question 17.

An insurance company retained an attorney to represent an insured and its employee in a suit brought against them by a plaintiff alleging that she was injured by the employee while the employee was working.

During confidential discussions with the employee, the attorney learned that the insurance company may not be obligated to provide a defense for the employee because the tort may have occurred outside the scope of the employee's employment.

Is it proper for the attorney to advise the insurance company and/or the insured of these discussions?

- (A) Yes, but the attorney must then withdraw from further representation of either party in the case.
- (B) Yes, because a lawyer shall not knowingly perpetrate a fraud.
- (C) No, because the attorney may then be assisting his client in misrepresenting a fact.
- (D) No, because a lawyer should not knowingly reveal a confidence or secret of his client.

Question 18.

An executive worked for a large international firm that required him to travel all around the globe. While employed abroad, he deposited large sums of money into foreign banks. Upon his return to the United States, he brought part of these funds with him, but he did not disclose the monies to his employer or to anyone else, nor did he declare them on his United States tax return.

The executive recently consulted an attorney for advice on how to bring the balance of the funds into the United States while avoiding United States tax liability. Both the attorney and the executive know that taxes will be owed if the monies are declared. The attorney suspected that the sums may be illegal kickbacks received by the executive. The attorney suggests to the executive ways to bring the money into the United States while avoiding detection.

Is the attorney subject to discipline?

- (A) Yes, because the attorney is knowingly assisting the executive in committing a crime or fraud.
- (B) Yes, unless the attorney did not inquire any further.
- (C) No, because the attorney did not participate in the earlier transactions that gave rise to the funds.
- (D) No, because attorney did not wrongfully profit from the executive's wrongdoing.

Question 19.

After serving for 20 years as a commissioner for the State Liquor Authority, an attorney resigned his position so that he could enter private practice. While he loved working at the Liquor Authority, the attorney hoped to add to his retirement fund by working a few years in the private sector.

In an effort to publicize his new practice, the attorney sent by regular mail and e-mail an announcement to other lawyers and business persons in the community stating that: (1) he is a former commissioner with the State Liquor Authority; (2) he intends to maintain an active practice on new matters before that agency; and (3) he intends to continue to maintain close ties with agency personnel with whom he was so close before he left the authority.

Is the attorney's announcement proper?

- (A) No, because he may not advertise his close ties with the State Liquor Authority.
- (B) No, because he may not take on new matters before the State Liquor Authority.
- (C) No, because he may not reference his former position with the State Liquor Authority.
- (D) Yes, as to each statement.

Question 20.

A client retained an attorney, a sole practitioner, to represent her in a corporate matter. Because the attorney was busy with other legal matters, the attorney entered into an agreement with another sole practitioner with whom she shared office space to do half of the legal work on the client's behalf. While the lawyers were not partners, they agreed that they would share the legal fee equally.

When work on the client's matter was completed, the attorney first advised the client of the work and fee sharing arrangement. The client was pleased with the results and had no reaction to the arrangement between the lawyers.

Was the agreement between the lawyers proper?

- (A) Yes, because lawyers who agree to dual representation may exchange client confidences and secrets.
- (B) Yes, because the other sole practitioner was better able to handle the matter than was the attorney, and the client did not object when notified.
- (C) No, because the attorney disclosed client information without prior client approval.
- (D) No, because the attorney shared the fee with the other sole practitioner, who was not her partner.

Question 21.

A licensed clinical psychologist maintains a private practice as a marriage counselor. In his practice, the psychologist sees many individuals whose marriages are irreconcilably broken. During the last several years, the psychologist has been represented by an attorney in both his business and personal matters. The psychologist has great confidence in the attorney's ability.

Recently, the attorney proposed to the psychologist that the latter refer patients seeking a divorce to the attorney. The attorney assured the psychologist that she would provide her typical fine services to those patients for her standard reasonable hourly rate. In return, the attorney proposed that she refer some of her clients who need marriage counseling to the psychologist. The psychologist liked the idea, and the two agreed to try out the arrangement for a few months.

Is the attorney subject to discipline?

- (A) Yes, because a lawyer may not request that a non-lawyer recommend the lawyer's legal services to others.
- (B) Yes, because a lawyer shall not give anything of value to a person for recommending the lawyer's services.
- (C) No, because a lawyer may arrange to have any third person refer the lawyer business provided any payment for such arrangement is not excessive.
- (D) No, if prospective clients are fully informed of the reciprocal referral agreement and the agreement is not exclusive.

Question 22.

A new client asked an attorney to write a letter recommending the client's nephew for admission to the bar. The client explained to the attorney that, while the client has no direct contact with his nephew, the client's sister (nephew's mother) has assured the client that the nephew is industrious and honest.

Is it proper for the attorney to write the letter?

- (A) Yes, but only after the attorney conducts her own independent investigation and is satisfied that the nephew is qualified.
- (B) Yes, based on the client's assurance, as long as the attorney does not know anything negative about the nephew's character.
- (C) Yes, but only if the attorney contacts the nephew's mother to verify the information.
- (D) Yes, but only if the client attests to his nephew's good character in a signed writing.

Question 23.

Several years ago, three partners of a law firm entered into a partnership agreement providing that, upon the death of any partner, the surviving partners would pay to the estate of the deceased partner 20% of the firm's profits each year for a period of five years.

One partner died last month. The executor of the estate has asked the surviving partners to begin directing partnership profits to her in the name of the estate. The surviving partners, citing the Model Rules of Professional Conduct, refuse to do so.

Is the partnership agreement proper with respect to the postmortem payments?

- (A) Yes, because the agreement provides for payment to the estate of the deceased partner and not to an individual nonlawyer.
- (B) Yes, because payment may be made to a lawyer's estate or to one or more specified persons for a reasonable period of time after the lawyer's death.
- (C) No, because the agreement provides for improper fee sharing with the estate.
- (D) No, unless the payments are limited to fees earned on cases completed by the date of the partner's death.

Question 24.

An attorney represented a client in the local criminal court. The client has been indicted for burglary. After the client took the stand at the trial to testify that she did not participate in the burglary, the client confidentially admitted to the attorney during a trial recess that the client committed the crime.

After advising the client of attorney's duty of candor to the court and attempting unsuccessfully to convince the client to return to the witness stand to correct her perjury, the attorney asked the court to be relieved as counsel. The court denied the attorney's motion.

Is Attorney is subject to discipline?

- (A) Yes, if she continues to represent the client.
- (B) Yes, if she continues to represent the client, unless the client admits the perjury.
- (C) No, if she informs the court of the perjury.
- (D) No, because the attorney, by asking to be relieved, has done all she can do under the Model Rules of Professional Conduct.

Question 25.

An adult patient sued his doctor for medical malpractice. The patient's claim was that the doctor negligently failed to fully inform the patient of the significant risks involved in the operation. However, before the operation, the patient told the doctor, "don't tell me anything about the operation that will upset me any more than I am now." The patient informed his attorney of this statement before the suit was filed.

The doctor is outraged and emotionally distressed by the lawsuit. The doctor believes that the patient's suit is groundless but still damaging to her reputation.

Is the attorney subject to discipline for filing the lawsuit against the doctor?

- (A) Yes, if the attorney knew the filing of the suit would probably injure the doctor's reputation.
- (B) Yes, if the attorney believed that the patient probably would not succeed in the suit.
- (C) No, if the attorney believed in good faith that the patient's claim was warranted under existing law.
- (D) No, if the attorney believed in good faith that the patient is entitled to recover from the doctor.

Question 26.

Three years ago in a contested divorce proceeding, a father was awarded custody of the couple's child. The mother recently remarried. She retained a highly regarded attorney, who practices exclusively matrimonial law.

On the mother's behalf, her attorney filed a motion requesting that the custody decree be modified and that the mother be awarded custody of the child. A copy of the motion was served on the father's lawyer of record.

A judge newly appointed to Family Court will decide the motion. The mother's attorney saw the judge at a Bar Association meeting. The judge said to the attorney, "I have heard that you have practiced family law for a long time. I want to do some reading in the custody area. Would you be willing to give me a list of the best writings on the subject of child custody?"

Is the judge's request proper?

- (A) Yes, if the attorney lists articles both favorable and unfavorable to the mother's position.
- (B) Yes, because the parties have not yet appeared before the judge.
- (C) No, unless the judge sends the father's lawyer of record a copy of the list and the cover letter sent to the judge.
- (D) No, because the attorney is not a disinterested expert.

Question 27.

While driving her car, a woman was involved in a collision with another driver. The driver filed suit against the woman, who forwarded the complaint to her insurance company as required by her insurance policy.

Pursuant to the policy provision that it would furnish a lawyer to defend its insured, the insurance company employed an attorney to handle the woman's case. The attorney filed an answer and, while preparing the case for trial, found evidence that the woman had intentionally run into the other driver. Intentional torts are excluded from coverage under the woman's insurance policy. Accordingly, if the woman intentionally ran into the other driver, the insurance company would not be required to defend or indemnify the woman.

Would it be proper for the attorney to inform the insurance company of the evidence?

- (A) Yes, and he may continue to represent the woman.
- (B) Yes, and he must withdraw from representing the woman and may represent the insurance company in an action against her based on a declaration of "no coverage."
- (C) No, and he may continue to represent the woman and may not inform the court of the possible "no coverage" defense.
- (D) No, and he may continue to represent the woman and inform the court of the possible "no coverage" defense.

Question 28.

A convicted felon retained an attorney to appeal his criminal conviction and to seek bail pending the appeal. The agreed fee for the appearance at the bail hearing was \$100 per hour. Attorney received \$8,000 from the felon, \$5,000 of which was a retainer to secure the attorney's fee and \$3,000 of which was for bail costs in the event that bail was obtained.

The attorney maintained two office bank accounts: a "Fee Account," in which all fees were deposited and from which all office expenses were paid, and a "Client Funds Account." The attorney promptly deposited the \$3,000 into the "Client Funds Account." The attorney expended six hours of time on the bail hearing, but the effort to obtain bail was unsuccessful. Dissatisfied, the felon immediately demanded the return of the \$8,000. The attorney returned \$7,400 and retained \$600.

Is the attorney subject to discipline?

- (A) Yes, because he should have kept all of the funds in the "Fee Account."
- (B) Yes, because the client is dissatisfied.
- (C) No, if he maintains \$300 to the "Fee Account" and \$300 in the "Client Funds Account."
- (D) No, if he maintains the \$600 in the "Client Funds Account" until the matter of the fee is resolved with the client.

Question 29.

An attorney was employed as a litigator in the legal department of a public utility company. The utility company was sued by a consumer group alleging that the utility company committed various acts in violation of its charter. Through its general counsel, the utility company instructed the attorney not to negotiate a settlement under any circumstances since the utility company believes that the suit is groundless and that a precedent need be established. The attorney believed the case should be settled if settlement is possible.

Must the attorney withdraw from representing the utility company?

- (A) Yes, because the utility company is controlling the attorney's judgment in settling the case.
- (B) Yes, because a lawyer should endeavor to avoid litigation.
- (C) No, if the utility company's position can be supported by a good faith argument.
- (D) No, because as an employee, the attorney is bound by all instructions from the employer's general counsel.

Question 30.

An attorney is an expert in securities law. She has represented an investment firm for several years. Each time the investment firm issued new debentures, the attorney wrote an opinion letter on whether the debenture issue required prior approval by the State Security Commission.

The attorney was recently asked by the investment firm to write an opinion letter for a new debenture issue of \$10,000,000. In doing so, she spent approximately twenty-five minutes checking to make sure the law had not changed since her last opinion letter and five minutes dictating to her secretary some minor changes from her last opinion letter to the investment firm. The attorney's normal hourly billing rate for handling legal matters is \$200 per hour, which is the hourly rate generally charged in the locality for similar services.

In arriving at a fee of \$7,500 for the opinion letter, the attorney considered that most lawyers in the area would charge a fee of \$10,000 for such an opinion letter, the security issue was for \$10,000,000, she has represented the investment firm for a long time, and is familiar with governmental regulations applicable to it.

Is the attorney's fee proper?

- (A) No, because what other lawyers charge is not relevant to a fee calculation.
- (B) No, because she spent less than one hour on the matter and her billing rate is \$200 per hour.
- (C) No, because familiarity with the client's needs should serve only to reduce the fee charged, not increase it.
- (D) Yes, because the factors she considered in determining her fee were appropriate.

Questions 31 and 32 are based on the following facts:

A client retained an attorney to institute an action against the defendant for breach of contract. The retainer agreement provided for a fee advance of \$2,000, which the client paid, toward a charge of \$100 per hour for services rendered in connection with the matter. The attorney spent eight hours reviewing the client's files, making an independent investigation of some facts in the client's case, and preparing a complaint.

Through her investigation, the attorney became convinced that the client's recollection of the facts was faulty and that the client would not prevail in the lawsuit. The attorney wishes to withdraw without filing suit, but the statute of limitations will run on the client's claim in one week and the client insists that the attorney at least file the complaint in the matter before withdrawing.

Question 31.

If the attorney files the complaint before withdrawing, is she subject to discipline?

- (A) No, unless the attorney is convinced that the client will not prevail in a lawsuit.
- (B) No, because the attorney accepted a retainer before she had a good faith basis for believing that the client would not prevail in a lawsuit.
- (C) Yes, if the action is frivolous.
- (D) Yes, even if the attorney can make an argument in good faith in support of the client's position.

Question 32.

If the client admits that his story is untrue and the attorney withdraws with Client's consent, is it proper for the attorney to keep all or any part of the \$2,000 retainer that the client paid?

- (A) Yes, the entire \$2,000.
- (B) Yes, but no more than \$800 for the eight hours of the attorney's services.
- (C) No, if the attorney withdraws without filing suit.
- (D) No, because the attorney withdrew from further representation of the client.

Question 33.

The state bar association established a pro bono law clinic two nights a week that invites the public to come in and speak with a volunteer lawyer for fifteen minutes regarding any legal issue. The program has been highly successful. Indeed, on some evenings as many as fifty people come to the bar association seeking free legal advice.

An attorney volunteers one evening every month. The attorney and her law firm specialize in civil litigation. One evening while volunteering, the attorney was approached by a local storeowner who wanted to know whether he had any defense to a lawsuit that was pending against him. The storeowner had been served with a summons and complaint only the day before.

The attorney initially explained to the storeowner that with only fifteen minutes allotted to each bar association visitor, her representation would be limited, but that the attorney would try to advise the storeowner to the best of her ability. Then the storeowner pulled a crumpled summons and complaint from his pocket, and the attorney realized that the plaintiff suing the storeowner was a credit card company that the attorney's firm currently represents. In fact, the firm was listed on the summons as the credit card company's counsel.

The attorney explained to the storeowner that a partner at her firm represents the plaintiff in the lawsuit and that the attorney has a conflict of interest. However, the attorney advised

the storeowner that he could consent to the conflict and then the attorney could continue and advise him to the best of her ability. After explaining his position in detail, the storeowner had used up his allotted 15 minutes, and he thanked the attorney for listening.

The attorney recommended a competent lawyer to assist the storeowner in the litigation.

The attorney learned some information that, if disclosed, would be damaging to the storeowner in the lawsuit.

Does the attorney's conversation with the storeowner require disqualification?

- (A) Yes, the attorney and her firm are disqualified from representing anyone in the litigation because the attorney knew of the conflict at the outset of the conversation with the storeowner.
- (B) No, but the attorney alone is disqualified from participating in the litigation, and must be screened.
- (C) No, the attorney and her firm would not be disqualified because of the storeowner's waiver of any conflict of interest.
- (D) No, the attorney and her firm would not be disqualified because the conflict of interest rules are waived for lawyers giving pro bono legal advice with no expectation of future legal services.

Question 34.

Two years ago, an attorney represented a husband in a divorce proceeding. The attorney obtained a favorable marital property settlement in which the wife transferred to the husband several pieces of real property located in another state.

Last week, the attorney was retained by a bank to execute on a \$20,000 judgment that the bank had obtained as a result of the husband's default on prior college loans. The bank had done an in-state property search and had not located any assets owned by the husband.

Is it proper for the attorney to represent the bank in this matter?

- (A) Yes, because the two matters are not substantially related, i.e., they did not arise out of the same transaction or occurrence.
- (B) Yes, because a lawyer's duty of loyalty ends when the representation is concluded.
- (C) No, because the attorney acquired protected information that now can be used against the husband to the advantage of bank.
- (D) No, because the attorney once represented the husband and may not subsequently represent another client with interests adverse to the husband's.

Question 35.

A client retained an attorney to represent her on a breach of contract claim. After a number of attempts at settlement, the attorney concluded that the case could not be settled and would have to be tried. The attorney did not regard himself as an effective trial lawyer and believed that the client's best interests required the attorney to associate with competent trial counsel.

One week before the trial date, the attorney engaged and prepared a trial lawyer, whom the attorney knew to be competent, to conduct the trial. At the trial, the attorney informed the client of the circumstances. The total fee charged to the client was not increased by the engagement of the trial lawyer.

Was it proper for the attorney to engage the trial lawyer?

- (A) Yes, because the client's best interests required the engagement of competent trial counsel.
- (B) Yes, because the client was informed of the engagement of the trial lawyer.
- (C) No, if the client did not provide prior consent to the engagement of the trial lawyer.
- (D) No, unless the attorney himself attended the trial with the trial lawyer.

Question 36.

An attorney is a member of the bar and a salaried employee of the trust department of a local bank. As part of his duties, the attorney prepares a monthly newsletter concerning wills, trusts, estates, and taxes, which the bank sends to its customers. Each newsletter contains a recommendation that customers review their wills in light of the information contained in the newsletter, and bring their wills to the bank's trust department where the trust officer will review them and answer any legal questions without charge. The bank's trust officer is not a lawyer. If the trust officer is unable to answer the customer's questions, the trust officer refers the customer to the attorney.

Is the attorney subject to discipline?

- (A) Yes, because the attorney is giving legal advice to persons who are not his clients.
- (B) Yes, because the attorney is aiding the bank in the unauthorized practice of law.
- (C) No, because there is no charge for the newsletter.
- (D) No, because it is the attorney's duty to present all matters in terms favorable to his client.

Question 37.

A judge was assigned to hear a criminal case. Ten years earlier, while serving as a deputy attorney general, the judge initiated an investigation of the same defendant for suspected criminal conduct. The investigation did not establish any basis for prosecution. None of the matters previously investigated are involved in or affect the present prosecution.

Is it proper for the judge to try the case?

- (A) Yes, because none of the matters previously investigated involve or affect the present prosecution.
- (B) Yes, unless the judge might be prejudiced against the defendant because of the prior investigation.
- (C) No, because the judge participated in the previous investigation of the defendant.
- (D) No, if the judge had responsibility in determining that the previous investigation did not establish any basis for the present prosecution.

Questions 38 through 40 are based on the following facts:

An attorney was the general counsel on an annual retainer for a pet food manufacturer. The label for a new cat food produced for the manufacturer contained the following words: “Royal Food Fit for a King.” The label did not include the statement, “Not for Human Consumption,” which violated applicable food and drug laws. As a result, the manufacturer’s officers and any employees responsible for the violation were subject to civil penalties.

Claimants filed a lawsuit to recover penalties against the manufacturer and its vice president, under whose direction the new cat food marketing campaign had been prepared. While the suit was pending, the court ordered that the manufacturer’s supply of the improperly labeled product be held in its warehouse subject to further order of the court.

The manufacturer’s board of directors authorized the attorney to represent both the manufacturer and its vice president, and agreed to pay the attorney’s fee out of corporate funds for all expenses, including any civil penalties that might be imposed on the manufacturer and the vice president.

Prior to the proceedings and without anyone else’s knowledge, the manager of the warehouse shipped out the balance of the improperly labeled cans. The manager believed “the company will settle this, and all the fuss will be over before anyone looks for the cans of cat food.” The court cited the manufacturer and the manager for contempt. The attorney agreed to represent both the manufacturer and the manager in the contempt proceeding.

Question 38.

Is it proper for the attorney to represent both the manufacturer and its vice president in the product labeling suit?

- (A) Yes, if the attorney reasonably believes there is no potential conflict of interest between the manufacturer and its vice president, and both consent to the joint representation.
- (B) Yes, because the manufacturer is legally responsible for the acts of its vice president under the doctrine of respondeat superior.
- (C) No, unless the attorney’s representation of the vice president is limited to attempting to affect a settlement of the claim against the vice president before trial.
- (D) No, because the attorney’s fees are being paid by manufacturer.

Question 39.

In the contempt proceeding, is it proper for the attorney to represent both the manufacturer and the manager if the manufacturer wishes to cross-claim against the manager?

- (A) Yes, if the manufacturer or its officers might be held in contempt because of the manager’s acts.
- (B) Yes, because the manager was an employee of the manufacturer at the time the improperly labeled product was shipped.
- (C) No, because the interests of the manufacturer and the manager are antagonistic to each other.
- (D) No, unless the manufacturer, through its board of directors, concurs in the attorney’s representation of the manager.

Question 40.

In the course of preparation for trial in the contempt proceeding, the attorney withdrew as the lawyer for the manager and the manager retained another lawyer. The withdrawing attorney assured the manager's new lawyer that he would cooperate in the transition.

Is it proper for the attorney to continue to represent the manufacturer on the contempt charges?

- (A) Yes, if the attorney gives the manager's new lawyer full access to all materials relevant to the manager's defense.
- (B) Yes, because the attorney's primary obligation is as general counsel to the manufacturer.
- (C) No, unless the attorney is satisfied that manager's new lawyer will represent the manager competently.
- (D) No, because the attorney may have acquired information from the manager that could be harmful to the manager's case.

Question 41.

An attorney was admitted to practice in State X, but did not practice law there. In association with a nonlawyer, the attorney engaged in a real estate investment business in State Y. An investor sued the attorney in State Y, alleging fraud by the attorney in connection with the attorney's real estate investment business. Judgment was rendered against the attorney, and that judgment is now final.

Is the attorney subject to discipline in State X?

- (A) Yes, because the attorney was the defendant in a civil action alleging fraud.
- (B) Yes, if the attorney's conduct involved fraud.
- (C) No, because the attorney's conduct did not involve the practice of law.
- (D) No, because the attorney's conduct took place in State Y.

Question 42.

An attorney wants to make it easier for her clients to pay her fees.

What actions are appropriate for the attorney to take?

- I Accept credit card payments for fees.
 - II Arrange for clients to obtain bank loans or a bank line of credit for the purpose of paying fees.
 - III Suggest that the client give the attorney publication rights concerning interesting cases as partial or total payment of the fee.
- (A) II only.
 - (B) I and II, but not III.
 - (C) I, II, and III.
 - (D) None of the above.

Question 43.

An attorney represents a client who is a defendant in a negligence action. The state where the action is pending recognizes the defense of comparative negligence and has retained the complete defense of assumption of risk. The attorney believes that, while the client was negligent, the plaintiff was partially at fault and may have voluntarily assumed the risk involved. However, he also believes that asserting the defense of assumption of risk is a problematic trial tactic: if the jury does not accept the theory, it might hold that the plaintiff was free from any fault. This might cause the jury to render a much larger verdict than it would if it found some negligence by the plaintiff.

Is it proper for the attorney to refrain from pleading assumption of risk as a defense?

- (A) Yes, if the attorney determines that it is in the client's best interest not to plead that defense.
- (B) Yes, because the attorney is responsible for the determination of tactics to be employed at the trial.
- (C) No, unless the client concurs in the attorney's decision after being fully advised.
- (D) No, if a good faith argument can be made that the defense is applicable under the facts.

Question 44.

A law firm was established as a professional corporation with five lawyer-shareholders. It employed twenty-five additional lawyers.

The law firm made the following arrangements:

- I Employees who are members of the bar cannot be made shareholders until they have been with the law firm for eight years.
- II The office manager, who is not a member of the bar, is executive vice president of the law firm.
- III A widow, whose husband was a lawyer-shareholder in the law firm until his death two years ago, will continue to hold the husband's shares in the law firm, which were distributed to his estate, until their infant child completes a law school education.

Which of the following are proper?

- (A) I only.
- (B) I and II, but not III.
- (C) I and III, but not II.
- (D) I, II, and III.

Question 45.

The court appointed a recently admitted attorney to represent an indigent defendant charged with a felony. After consulting with the defendant and attempting for two days to prepare the case for trial, the attorney became convinced that he lacked the knowledge and experience to represent the defendant effectively.

Which of the following is/are proper courses of action for the attorney?

- I Request permission from the court to withdraw from representing the defendant because the attorney knows that he is not competent to handle the case.
- II Request that the court appoint experienced counsel and grant a continuance to enable counsel to prepare the case.
- III Explain the circumstances to the defendant and, if the defendant consents, proceed to represent the defendant to the best of the attorney's ability.

- (A) I only.
- (B) I and II, but not III.
- (C) II and III, but not I.
- (D) I, II, and III.

Question 46.

Three members of the five-person board of directors of American, Inc. were named as defendants in a derivative action that accused them of serious wrongdoing. The president of American, Inc. asked an attorney who was American, Inc.'s general corporate counsel, to give an opinion to the board, required under state law, on whether the directors involved in the litigation were entitled to indemnification for their substantial legal fees. The applicable state law permits indemnification if, based on the opinion of independent legal counsel, the directors have not breached their duty of good faith to the corporation.

Is it proper for the attorney to render the opinion?

- (A) Yes, if the attorney is competent to do so.
- (B) Yes, but only if the attorney first withdraws as corporate counsel.
- (C) No, but he may refer the matter to an associate in his firm.
- (D) No, but he may provide the board with a list of independent attorneys he knows to be competent in corporate law.

Question 47.

An experienced trial lawyer wants to expand his business. Over the years, he has been retained by several Fortune 500 companies, and he believes that prospective clients are impressed by that fact.

The trial lawyer has prepared an advertisement that he intends to place in the law journal and in the local newspaper. He has included in the advertisement a list of the large and well-known clients he has served in the past.

If the trial lawyer runs the advertisement as is, is he subject to discipline?

- (A) Yes, because an attorney may not disclose clients' identities.
- (B) Yes, because such an advertisement is self-laudatory.
- (C) No, if the trial lawyer received written permission from the clients to do so.
- (D) No, because a client's identity is not protected from disclosure.

Question 48.

An attorney has a highly efficient staff of paraprofessional legal assistants, all of whom are graduates of recognized legal assistant educational programs.

Recently, the statute of limitations on one of the attorney's client's claims expired when a legal assistant negligently misplaced the client's file and the lawsuit was not commenced within the time permitted by law.

Which of the following correctly states the attorney's ethical obligation?

- (A) The attorney is subject to liability for malpractice and is also subject to discipline on the theory of respondeat superior.
- (B) Attorney is subject to liability for malpractice or is subject to discipline at client's election.
- (C) The attorney is subject to liability for malpractice but is not subject to discipline unless the attorney failed to supervise the legal assistant adequately.
- (D) The attorney is not subject to liability for malpractice and is not subject to discipline if the attorney personally was not negligent.

Question 49.

Four years ago, a client substantially remodeled his small industrial plant to conform to the recommended statutory standards for waste-water discharge into a nearby stream. Last year, the legislature enacted more stringent standards and required compliance within two years. It would be extremely difficult and costly for the client to remodel his plant again to meet this short deadline, and it is likely that he will have to shut down his plant for one full year to make the conversion. This will cause a loss of income that may push the client into insolvency.

The state legislature is conducting public hearings to gather evidence and hear testimony on whether the two year deadline should be extended. The client has asked an attorney, who previously served as a state legislator and has extensive experience in the area of environmental law, to seek an amendment to the statute to extend the deadline to four years.

Is it proper for the attorney to accept this employment?

- (A) Yes, and he may seek to get the statute amended by appearing at the legislative hearing without disclosing the client's identity, but disclosing that the attorney is appearing in a representative capacity.
- (B) Yes, if he identifies the client on whose behalf he appears.
- (C) No, not under any circumstances.
- (D) No, if the majority of the legislators are persons with whom he has previously served in the legislature.

Question 50.

While serving as an assistant district attorney, an attorney presented evidence to a grand jury that led to indictments charging thirty-two defendants with conspiracy to sell controlled drugs. Shortly after the grand jury returned the indictments, the attorney resigned from his position in the district attorney's office and became affiliated as an associate in a law firm. At the time, the firm represented one of the indicted co-defendants.

Is it proper for the firm to continue to represent the co-defendant?

- (A) Yes, if the attorney does not reveal to the law firm any confidences or secrets learned while an assistant district attorney.
- (B) Yes, because a prosecutor must already have made timely disclosure to the defense of any exculpatory evidence.
- (C) No, unless the attorney agrees not to participate in the representation of defendant.
- (D) No, because the attorney had substantial responsibility for the indictment of the defendant.

Question 51.

A client retained an attorney to defend her in a defamation action. The client did not have liability insurance, and expected to pay all of her legal bills out of her own pocket. The attorney asked for a \$10,000 retainer to initially appear in the action. In the written retainer letter, the attorney estimated that the legal fees might exceed \$100,000 if the parties did not settle. The client has explained to the attorney that the client has no savings, and that she hopes to be able to pay the attorney's legal fees from the client's wages earned over the next several years.

In the retainer letter, the attorney asked the client to execute a note and mortgage on a small apartment building that the client owns in order to secure payment of the attorney's future legal fees.

Is the attorney subject to discipline?

- (A) Yes, because it is per se unethical for a lawyer to ask a client to give security for payment of the legal fee.
- (B) Yes, because it creates a conflict of interest between the attorney's financial interests and those of the client.
- (C) No, as long as the transaction is fair and reasonable, its terms are fully disclosed to the client in writing, the client is advised to seek independent counsel, and the client consents in writing.
- (D) No, because the property in which the security interest is placed is not the subject of the litigation in which the attorney represents the client.

Question 52.

A sitting trial court judge served on the board of trustees of a private boarding school developed to assist gifted students who otherwise could not afford to go to boarding school. The judge was an alumnus of the school and appreciative for the education he received there. His efforts on behalf of his alma mater in no way interfered with or competed for his time on the bench.

The boarding school asked the judge to assist with running its annual charity auction to raise scholarship money for the incoming class of freshmen.

To which of the following may the judge agree?

- I. Permit his name to be included with the other board members on the fundraiser invitations sent out to the general public.
 - II. Sit on the fund raising committee and help plan the fund raising effort.
 - III. Act as the auctioneer.
- (A) I only.
 - (B) II only.
 - (C) I and II, but not III.
 - (D) Neither I, II, nor III.

Question 53.

An attorney represented a client in the sale of the client's real property. After the contract of sale was entered, the client and the buyer began to disagree about the final closing price. The client wrote a letter to the attorney simply stating that the client would not take less than \$50,000 for the property. The client then sent a letter to the buyer expressing this very same position. The disagreement over the closing price eventually led to litigation between the client and the buyer. The attorney, primarily a non-litigation transactional lawyer, did not represent the client in the litigation.

After months of negotiation and discovery, the client's insistence upon receiving \$50,000 became an issue in the litigation. Despite a diligent search of his records, the buyer could not locate the client's letter to him. Over client's objection, the buyer then sought to obtain the letter the client sent to the attorney.

Is the court likely to rule that the attorney must turn over the letter?

- (A) Yes, because it is the best evidence of the \$50,000 position.
- (B) Yes, because the client did not write the letter for the purpose of seeking legal advice or counsel.
- (C) No, because the letter is protected by the attorney-client privilege.
- (D) No, because the letter was written in anticipation of litigation.

Question 54.

Shortly after the statute of limitations on his client's claim expired, a lawyer telephoned his opponent's counsel and explained that his wife recently died of cancer and that he allowed the statute of limitations to run because he had been on a severe drinking binge. He further explained that he had completed an Alcoholics Anonymous program and has not had a drink in five weeks. The opponent's counsel then agreed on the phone to permit him to serve the summons late, and not to raise the statute of limitations as a defense.

Is the opponent's counsel subject to discipline?

- (A) Yes.
- (B) No, because the oral acceptance of the complaint was not supported by any new consideration and, therefore, was invalid.
- (C) No, because a lawyer does not violate the Model Rules if she "accedes to reasonable requests of opposing counsel."
- (D) No, because a lawyer, not the client, is in charge of the strategy of the case.

Question 55.

An attorney represented the seller in the sale of the seller's commercial property. The buyer, who was in a hurry to purchase the property because she intended to use it as the corporate headquarters for her rapidly growing business, was unrepresented by counsel.

During the negotiations, the buyer raised several questions about the tenant currently leasing the property from the seller. Specifically, the buyer asked when the tenant's lease on the property was due to expire. The attorney truthfully told the seller that the lease was set to expire in six weeks, and offered to show the lease to the buyer. Wanting assurance that the tenant would timely vacate, the buyer also asks the attorney whether the attorney thought that the tenant would leave at the end of the lease. The attorney truthfully said "yes," and suggested that the buyer retain her own lawyer to review the lease. The buyer declined, and stated, "That's O.K., I trust you." After the meeting, the attorney wrote to the buyer and, again, suggested that she obtain counsel.

Is the attorney subject to discipline?

- (A) Yes, because she communicated directly with a party unrepresented by counsel.
- (B) Yes, because she gave legal advice to the buyer.
- (C) No, because she responded to the buyer's inquiries truthfully and without misrepresentation.
- (D) No, because she wrote to buyer urging the buyer to obtain counsel.

Question 56.

For several years, an attorney has enjoyed a successful, growing matrimonial law and estate planning practice. In fact, the attorney's practice has grown at such a pace that she felt that her ability to handle her growing list of clients may soon be jeopardized.

After some soul searching, the attorney decided that she prefers to practice estate planning and that she will sell her matrimonial law practice to Beta, a well-known and respected matrimonial lawyer with whom the attorney has worked in the past. As part of the sale, the attorney agreed to a restrictive covenant preventing the attorney from accepting cases involving matrimonial law within Beta's geographic area. Prior to transferring her matrimonial case files to Beta, the attorney wrote a letter to each matrimonial client explaining to them that she was withdrawing from the practice of matrimonial law, that the clients were free to seek other counsel, and that they will not incur increased costs due to the sale of her practice. The attorney also informed the clients that if she did not hear from them in 90 days, she would assume that they consented to the transfer.

Is the attorney's sale proper?

- (A) No, because she sold only part of her practice.
- (B) No, because the sale of her practice infringes on her clients' right to the counsel of their choice.
- (C) Yes, because she alerted her matrimonial clients of their rights and provided them with ample time to find and consult other counsel.
- (D) Yes, if she retains liability insurance for any malpractice Beta may commit with respect to the transferred files.

Question 57.

An attorney represented the plaintiff in a personal injury case. Pursuant to the attorney's retainer agreement, the attorney will receive a contingent fee of 20% of any recovery received by settlement and 30% if the case goes to trial. After the attorney filed the complaint, the defendant's insurance company conducted an investigation and determined the plaintiff was entitled to a recovery. On February 1, the insurer requested time to value the plaintiff's claim and the attorney agreed.

On February 15, the attorney was suspended for six months by the appropriate disciplinary body for misconduct the attorney committed in a matter unrelated to the plaintiff's.

On May 1, the insurer sent a fax to the attorney in which the insurance company offered a \$1 million settlement. The attorney forwarded the fax to the plaintiff without comment. The plaintiff received the letter and was ecstatic. The plaintiff wrote back to the attorney stating simply, "I'll take it!" The attorney forwarded the plaintiff's letter to the insurer. On August 1, the insurer sent a settlement agreement to the attorney and the attorney merely forwarded it to the plaintiff. The matter settled shortly thereafter for \$1 million.

Is the attorney subject to discipline?

- (A) Yes, because he did not immediately notify the plaintiff and the insurer of his suspension.
- (B) Yes, because he did not immediately cease practicing law when he received notice of his suspension.
- (C) No, because he did not practice law during his suspension.
- (D) No, because the results achieved by the attorney were not compromised by his limited involvement in the matter.

Question 58.

After being elected to the state senate, a lawyer relinquished her interest in and left the law firm where she was partner, to take office in the state senate for a six-year term.

A liquor wholesaler, which was a longtime client of the senator's old firm, has its corporate headquarters in the senator's district. A regulatory proposal that would significantly and adversely impact the wholesaler's ability to do business within state is currently before the senate.

The wholesaler contacted the senator to write a letter opposing the proposed legislation. After reviewing the proposed legislation and conducting her own independent investigation, the senator believes that the regulations would be detrimental to the wholesaler, as well as to other businesses headquartered in the state. Accordingly, the senator voiced her disapproval of the proposed legislation in a letter on her official senate letterhead to the committee considering the proposed legislation.

Is the senator subject to discipline?

- (A) Yes, because the wholesaler is a client of the senator's old firm.
- (B) Yes, because she is using her influence as a government official to the benefit of the wholesaler.
- (C) No, because she acted in her capacity as a government official on behalf of a constituent.
- (D) No, because she no longer practices law.

Question 59.

Two attorneys are the only partners in a law firm that handles only civil matters. The partnership has been in business for two years, and the practice is just beginning to grow and become profitable.

A judge before whom one attorney often appears asked the attorney to represent a criminal defendant who could not afford to represent himself. Reluctant to disappoint the judge, the attorney accepted the matter.

Upon hearing the attorney tell of the representation, his partner strongly urged the attorney to withdraw from the case. The partner reminded the attorney that the partner just completed a pro bono case in which the partner expended over 110 hours, and that in any event the partnership was barely earning a profit.

Is it proper for the attorney to withdraw from the case to which he was appointed?

- (A) Yes, if the attorney does not feel that he is competent or can become competent to handle the criminal defendant's case.
- (B) Yes, if the partners' practice will not earn a profit while the criminal defendant's matter is pending.
- (C) No, because the judge ordered the appointment.
- (D) No, if the attorney feels that doing so will not jeopardize his other matters pending before the judge.

Question 60.

A newly admitted attorney who is a sole practitioner and limits her practice to real estate transactions was visited by a client who had encountered a bitter contract dispute with his supplier. The attorney did not mention to the client that she did not handle such matters. When the client discussed that over \$1 million was at stake, the attorney agreed to represent the client for her usual hourly fee.

In representing the client, the attorney did not associate herself with another, more experienced attorney because she honestly felt that she could educate herself on the issues presented by the client's matter without assistance.

Was it proper for the attorney to represent the client in the contract dispute?

- (A) Yes, because the attorney believed that she could become competent to handle the client's matter.
- (B) Yes, if the attorney became competent to handle the client's matter without additional cost to the client.
- (C) No, because the attorney was incompetent when she took on the matter.
- (D) No, because the attorney did not inform the client that the attorney's practice previously had been limited to real estate work.

Answer to Question 1

(A) - Rule 1.6 states, “[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation” Because the attorney did not obtain the client’s consent, the attorney’s revelation to the entrepreneur was improper, and choice (A) is correct. Note also that the attorney would be prohibited from using this same information to purchase land in the area for her own speculative purposes, but her personal benefit is not required for an ethical violation. Thus, choice (C) is incorrect. Finally, the nondisclosure of the client’s identity or the listener’s ability to keep the secret are not relevant for purposes of finding a violation. Hence, choices (B) and (D) are incorrect.

Answer to Question 2

(D) - A lawyer may publish or broadcast information to the public as long as it is not false, fraudulent, misleading, or deceptive. Rule 7.1 defines a “false or misleading communication” as one that contains a material misrepresentation of law or fact, or omits a fact necessary to prevent misleading its reader, e.g., advertising services at a fixed fee but failing to disclose hidden filing fees or court costs is misleading. Here, the attorney’s advertisement is clear with respect to the fees and costs and nothing in the advertisement is false or misleading. Thus, the advertisement is proper, choice (D) is the best answer, and choices (A), (B), and (C) are incorrect.

Answer to Question 3

(A) - Rule 4.2 prohibits communication by an attorney with a person the attorney knows to be represented in that matter by counsel, unless the attorney has prior consent from that person’s counsel. Here, the facts do not indicate that the employee was represented by counsel. In this situation, Rule 4.3 would simply prohibit the attorney from deceiving the employee as to the attorney’s undivided loyalty to the employer. In addition, the attorney must explain that he is not an objective authority on the law. *A.B.A. Informal Op. 908 (1966)*.

Remember that under the Rules, a lawyer’s statements must be truthful and not deceitful. *Rule 4.1.* Under Rule 4.3, where a lawyer knows that an unrepresented person’s interests are clearly adverse to the lawyer’s client, the lawyer is prohibited from giving that unrepresented person any “legal advice.” Here, the attorney is not giving the employee any advice; the attorney is simply gathering facts and evidence. Thus, choice (A) is correct, and choice (C) is not. Further, neither the attorney’s status as a lawyer in private practice (i.e., he is not a prosecutor) nor his decision to bring a civil action against the employee are dispositive here. Thus, choices (B) and (D) likewise are incorrect.

Answer to Question 4

(D) - Under the Rules, secret tape recordings made by attorneys are not prohibited as long as the recording is lawful. Rule 4.4 states that “[i]n representing a client, a lawyer shall not use . . . methods of obtaining evidence that violate the legal rights of [a third] person.” For example, the United States Code and many state statutes expressly provide that it is not unlawful for a party to a

telephone conversation to tape record it surreptitiously. *18 U.S.C. § 3511(2)(d); Mena v. Key Foods Stores Cooperative, Inc.*, 195 Misc. 2d 402, 405 n.6 (Sup. Ct. Kings Co. 2003).

The *American Bar Association Committee on Ethics and Professional Responsibility Formal Opinion 01-422 (2001)* states that a lawyer who electronically records a conversation does not necessarily violate the Model Rules. Recordings may not be made in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, and a lawyer cannot falsely represent that a conversation is not being recorded. The Committee was divided as to whether a lawyer may record a client-lawyer conversation without the client's knowledge and consent, but agreed that it is "inadvisable to do so." See also *New York County Lawyers Ass'n Committee on Professional Ethics Opinion 696 (1993)*.

Clearly, the attorney here lied to the insured regarding the recording and its legal admissibility. This involved dishonestly, fraud, and deceit. *Rule 4.1*. Thus, choice (D) is the best choice. Choice (B) is incorrect because it is not an accurate statement of law. Choices (A) and (C) are incorrect because they are not relevant.

Answer to Question 5

(B) - CJC § 4.1(A)(13) states that a judicial candidate should not make "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." While her statement that she will judge "fairly and impartially" is entirely consistent with the impartial performance of the adjudicative duties of judicial office, her pledge to "oppose any method of flag desecration" could lead a reasonable person to believe that she "has specifically undertaken to reach a particular result" in a flag desecration case. Choices (C) and (D) miss this point, and, thus, choice (B) is the best answer;

CJC § 4.1 Comment 13 permits "statements or announcements of personal views on legal, political, or other issues," but also notes that "[w]hen making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views." Statements that "merely express a viewpoint" are different from those that "unequivocally articulate a pledge or promise of future conduct or decision-making that compromise the faithful and impartial performances of judicial duties." *Matter of Shanley*, 98 N.Y.2d 310 (2002); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

CJC § 4.1 Comment 14 states that "[a] judicial candidate may make campaign promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring." Thus, the statements regarding support for the court administration budget are proper; moreover, this type of criticism objectively does not undermine the public's confidence. Choice (A) is incorrect.

Answer to Question 6

(A) - The potential use of the attorney's public position to secure personal gain and favor for a private client requires disqualification. Moreover, the very appearance of impropriety should be avoided. Thus, the simultaneous representation of a municipality (by a public official) and a land developer operating within that municipality is ethically forbidden. Accordingly, choice (A) is the best answer.

"The subject of land development is one in which the likelihood of transactions with a municipality and the room for public misunderstanding are so great that a member of the bar should not represent a developer operating in a municipality in which the member of the bar is the municipal attorney or the holder of any municipal office of apparent influence." *In re A. and B.*, 44 N.J. 331, 333 (1965); accord Rules 1.6 & 1.7.

Moreover, a lawyer who is a public official, whether full-time or part-time, should not engage in activities in which the lawyer's personal or professional interests are, or foreseeably may be, in conflict with the best interests of the municipality.

Answer to Question 7

(A) - A lawyer cannot prospectively limit or exonerate himself or herself from liability for the lawyer's own malpractice. *Rule 1.8(h)*. A lawyer who properly handles the affairs of a client does not need to limit her liability for professional services, and one who has the need should not be permitted to do so.

Here, the attorney did not attempt to exonerate herself, but merely sought to explain her conduct during the representation. This type of communication actually furthers the open commentary and discourse between client and lawyer encouraged by Rule 1.4. Assuming the attorney does not make any misrepresentations, she is free to pursue her legal representation review system and to video record it with the client's consent. Thus, choice (A) is correct. Because the recordings, if kept confidential, do not violate the attorney-client privilege, choices (B) and (D) are incorrect.

Answer to Question 8

(D) - The drafters of the Model Rules deleted the old Code of Professional Responsibility's prohibition against using a threat of criminal prosecution to one's advantage in a civil case. However, if the tactic is used, the criminal matter must be related to the client's civil claim, the lawyer must have a well-founded belief that both the civil claim and criminal charges are warranted by law and the facts, and the lawyer may not attempt to exert or suggest improper influence over the criminal matter. *A.B.A. Formal Op. 363 (1992)*. Here, the attorney's conduct was improper because the civil matter (paternity) and the criminal matter (drugs) were totally unrelated. Thus, choice (D) is the correct answer and choices (A), (B), and (C), which attempt to justify the attorney's statement, are incorrect.

Note that it is generally not unethical to threaten to bring a civil action against a person unless the lawyer knows that the client will not bring such an action; if the lawyer knows that the client has no intention of commencing an action, the lawyer's threats of litigation constitute false statements to a third person in violation of Rule 4.1(a).

Answer to Question 9

(B) - A judge may "obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and advice received." *CJC* § 2.9(A)(2).

The judge's contact with the professor is proper if the judge notifies the parties that she is consulting the professor in advance, and then gives them the opportunity to object to the chosen expert and respond to the advice received. Thus, choice (B) is the best answer. Such communication does not give rise to an appearance of impropriety and engaging in it does not constitute improper conduct under the Code of Judicial Conduct. Thus, choices (A), (C), and (D) are incorrect.

Answer to Question 10

(C) - It is for the client to decide whether to waive the right to plead an affirmative defense. Rule 1.2(a) states that "a lawyer shall abide by a client's decisions concerning the objectives of representation, and . . . shall consult with the client as to the means by which they are to be pursued." Clearly, the attorney does not have implied authority to waive a valuable and critical affirmative defense that otherwise may terminate the litigation. Thus, choice (C) is better than choices (A) or (D). Choice (B) is not the best answer because withdrawal here does not best serve the interests of the attorney's client, the friend, as executor of the woman's estate.

Note that Rule 2.1 requires the lawyer, as an advisor, to refer not only to the law, but also to moral, economic, social, and political factors that may be relevant in the case. Thus, the lawyer should highlight the possibility of harsh consequences that might result from the assertion of legally permissible positions, but the lawyer must remember that the decision whether to forego legally available objectives, methods, or defenses for the purpose of achieving alternative goals (e.g., business decisions) is ultimately for the client, not the lawyer.

In the event that the client insists upon a legal (and ethical), but repugnant or detrimental, course of conduct with which the lawyer fundamentally disagrees, the lawyer may withdraw from the employment. *Rule 1.16(b)(4)*.

Answer to Question 11

(A) - *CJC* § 2.9(A)(4) provides that "[a] judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge." Thus, choice (A) is correct. Choice (D), which is correct in many instances, is not in the context

described under these facts, i.e., where the parties consent and the purpose of the communications is to further settlement.

While choice (C) is a correct statement of law (*CJC* § 2.5(4)), it does not apply to this fact pattern. Choice (B) simply is not the standard.

Answer to Question 12

(D) - “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” *Rule 3.1*. Thus, as an advocate, the attorney must zealously advance the client’s interest, but cannot assert a “frivolous” claim or defense. In fact, the attorney should withdraw if the client insists on a claim or defense that is not warranted under existing law and which cannot be supported by a good faith argument for a modification of existing law. *Rule 1.16(a)(1)*. Here, if the attorney believes in good faith that the defense has merit, he may assert it. Thus, choice (D) is correct. While choices (A) and (B) are close to the mark, choice (D) is the best answer.

Answer to Question 13

(A) - Rule 8.4(d) states that a lawyer should not engage in conduct that is prejudicial to the administration of justice. Additionally, under Rule 8.4(e), an attorney should not convey or permit others to convey the impression that the attorney is in a special position to influence the court or its personnel.

Here, it could reasonably be inferred that the gifts were intended to influence or could reasonably be expected to influence the clerks in the performance of their duties. The gifts also could be construed as a reward for their official action in the past. Thus, choice (A) is the best answer. Choice (B) is incorrect because no \$100 rule exists. Whether the attorney personally conducted the raffle is not relevant, so choice (C) is incorrect. Finally, because the gifts could give rise to the appearance of impropriety, choice (D) is incorrect.

Answer to Question 14

(C) - A client’s secrets or confidences may not be disclosed or used for the advantage of a third party unless the client consents after full disclosure. *Rule 1.6*. The lawyer’s duty is to preserve the client’s secrets and confidences, and this duty is broader in scope than the evidentiary attorney-client privilege. The attorney’s revelation of his client’s statements would be detrimental to the latter’s interests, and the attorney properly declined to reveal them. Thus, choice (C), which states that the attorney acted properly, is the best choice, and choices (A) and (D), which promote the revelation of a client’s secrets, are incorrect.

While choice (B) would also be a possible correct choice if the facts indicated that there was a significant risk that the attorney’s representation of his client would be materially limited by the attorney’s friendship with his law school friend (*Rule 1.7(a)(2)*), the facts do not indicate the existence of such circumstances. While choice (B) would also preserve the client’s confidences,

nothing in the facts suggests that the attorney should withdraw from representing his client. Thus, choice (B) is not the best choice.

Answer to Question 15

(B) - An attorney should avoid indiscreet conversations involving clients. The ethical duty of confidentiality goes beyond just the matter giving rise to the attorney-client privilege; it extends to any information “relating to representation” of the client whether acquired before, during or after the representation, until such information has become generally known. *Rules 1.6 & 1.9*. Under Rule 1.6, “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation.” *Rule 1.6(a)*. Thus, choice (B), which favors discretion, is correct.

Note that, although choice (A) is true, the settlement agreement did not carry the element of confidentiality in that it had been revealed to several people. Note also that, to carry the badge of secrecy for the lawyer, the client’s secret need not be revealed to the lawyer by the client. Thus, choice (C) is incorrect. Moreover, choice (D) is incorrect because even if the attorney-client privilege does not encompass the settlement agreement, the agreement still constitutes a client’s secret.

Answer to Question 16

(D) - Rule 1.5(e) states that an attorney may split or share a fee with a referring attorney only:

1. With the client’s prior informed consent, confirmed in writing (which was the case here); *and*
2. The fee paid is commensurate with the work done or the malpractice liability for the representation is jointly assumed by the referring attorney in a written agreement.

Here, the referring attorney performed no work and assumed no responsibility. Requiring at least the assumption of malpractice liability by the referring attorney encourages the referring attorney to pick with care the lawyer to whom the case is referred; the referring attorney will have an added incentive to pick the most competent lawyer. Thus, the payment by the attorney and its receipt by the other lawyer were improper. “Where an attorney merely brings about the employment of another attorney, but renders no service and assumes no responsibility in the matter, a division of fees is improper.” *A.B.A. Formal Op. 204*. Thus, choice (D), the only choice concluding that the arrangement is improper as to both attorneys, is correct.

Answer to Question 17

(D) - The Comment to Rule 1.7 states that “[a] lawyer may be paid from a source other than the client, including a co-client, if the client is informed . . . and consents, and the arrangement does not compromise the lawyer’s duty of loyalty or independent judgment to the client.” *See*

also Rule 1.8(f). When an attorney is retained by an insurance company to defend the employee of its insured, it is the employee who is the “client.” It follows that the attorney may not reveal the confidences or secrets of the client to the insurance company who pays the attorney’s fee without the client’s informed consent. Rule 1.6. Thus, choice (D) is correct.

The employer here is also the attorney’s client, and the employer’s liability to the plaintiff may be affected by the scope of employment circumstances, i.e., whether the negligent employee’s acts were within the scope of the employer’s business. See *A.B.A. Informal Op. 1476 (1981)* (concluding that both the employer and the employee were clients, but were clients who may possess differing interests giving rise to a conflict for the attorney). If the act was not within the scope of employment, then the employer would not be vicariously liable. Here, the attorney would be unable to represent the employer-client in denying the employer’s legal responsibility for the employee’s conduct without concurrently acting adversely to the interest of the employee-client in preserving the employee’s insurance protection.

Perhaps the employer-client and the insurance company here would be willing to forego a “scope of employment” defense and stand with the employee, in which case the interests of the attorney’s clients would not differ. The attorney’s dilemma, however, is that in seeking this consent, the attorney might have to disclose the information that he should preserve in confidence. The attorney should not do so without the employee’s consent after full advice as to the possible adverse consequences. If the matter cannot be resolved with the agreement of the insurance company, employer, and employee, then the attorney may have a duty to seek to withdraw from the litigation. If the attorney withdraws, he should recommend to the insurance company that separate counsel be retained to represent only the employee’s interest. Because the attorney may not reveal the employee’s confidence before withdrawing, choice (A) is incorrect.

Of course, the attorney may not subsequently represent the insurance company in asserting that the employee-client is outside policy coverage. *A.B.A. Informal Ops. 728 (1963) & 873 (1965)*.

Answer to Question 18

(A) - An attorney should not participate in a transaction to effect a criminal or fraudulent avoidance of tax liability. Rule 1.2 cmt. 12. Counseling or assisting a client in conduct that the lawyer “knows is criminal or fraudulent” is prohibited. Rule 1.2(d). Thus, choice (A) is the best choice. A lawyer cannot escape responsibility by avoiding inquiry. A duty to inquire further is imposed, requiring an attorney to be prepared adequately (and thus informed) to represent a client competently. Thus, the attorney cannot turn a blind eye to his suspicions that the funds were illegally obtained, so choice (B) is incorrect. Choices (C) and (D) reach the wrong conclusion and merely assert irrelevant facts.

Note that the Rules further state that, if the lawyer’s services will be used by the client to materially further a course of illegal or fraudulent conduct, then the lawyer must withdraw. Rule 1.2(d) & 1.16(a).

Answer to Question 19

(A) - The announcement by the attorney is proper to the extent he lists his prior title and his intended area of private practice. However, there is a “prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results that violate the Rules of Professional Conduct or other law.” *Rule 7.1 cmt. 4*. The statement that implies such an ability is improper, and choice (A) is correct. Truthful reference to his former employment and his intent to take on new matters before the Liquor Authority is properly included in the advertisement.

Answer to Question 20

(C) - The Rules permit a lawyer to share client information related to the representation only with lawyers in the same law firm. *Rule 1.6 cmt. 5*. “Thus disclosure of client information to lawyers in a shared-office arrangement is permissible only with prior permission of the affected client. For that reason, without prior client consent, a lawyer may not retain or speak to a lawyer from outside the firm for consultation about client confidential matters.” *C. Wolfram, Modern Legal Ethics § 8.12.14 at 891 (1986)*. Thus, choice (C) is correct and choice (A) is not.

Choice (B) is incorrect because the issue is not who is better able to adequately prepare and handle the client’s matter, but whether and under what conditions the attorney could properly disclose the client’s information to another lawyer. The client’s informed consent should have been obtained prior to the attorney’s disclosure to the other lawyer, not after the fact. A client’s pleasure or approval does not excuse an ethical violation. The consent also should have been confirmed in writing. *Rule 1.5(e)(2)*.

Choice (D) is inaccurate because fee-splitting between lawyers who are not in the same firm is permissible only if it is in proportion to the services performed, or, alternatively, if the responsibility for the client’s claim or defense is jointly assumed by each lawyer, the total fee does not exceed reasonable compensation for all legal services rendered to the client, and the agreement is confirmed in writing. *Rule 1.5(e)*. “A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing.” *Rule 1.5 cmt. 7*.

Answer to Question 21

(D) - Lawyers are not permitted to pay others for channeling professional work. *Rule 7.2 cmt. 5*. However, a lawyer may agree to refer clients to another lawyer or a nonlawyer professional, in exchange for the referral of the other lawyer’s or nonlawyer’s clients or customers to the lawyer. Such arrangements may not be exclusive and the client must be informed of the referral agreement. Here, the arrangement does not include any impermissible payments, and choice (D), which also makes clear that the arrangement is not exclusive, is the best choice; for the same reasons, choice (A) is not a correct statement of law.

Choice (B) is the pre-2002 amendment general rule and would have been the correct choice prior to amendment. However, the 2002 amendment of Rule 7.2(b)(4) now permits reciprocal referral arrangements between professionals as long as the arrangement does not interfere with the lawyer's professional judgment. Accordingly, choice (D) is now the better choice, even though (B) is a correct statement of law in that a lawyer who receives referrals from another lawyer or a nonlawyer professional must not pay anything solely for the referral.

Choice (C) clearly violates Rule 7.2(b), which flatly prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services.

Answer to Question 22

(A) - Rule 8.1 states "a lawyer in connection with a bar admission application . . . shall not: (a) knowingly make a false statement of material fact; or (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter."

Clearly, writing a letter of recommendation for someone an attorney has never even met is a disingenuous representation. Relying on the representations of others, no matter how trustworthy or reliable the endorers have proven in the past, is unacceptable. Thus, choice (A) is the best answer.

Answer to Question 23

(B) - "A lawyer or law firm shall not share legal fees with a nonlawyer, except that (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified [lay] persons." *Rule 5.4(a)(1)*. Here, choice (B) is best choice because it accounts for the "one or more specified persons" and "reasonable period of time" contemplated by Rule 5.4(a)(1). Choice (A) is close, but it is less detailed and leaves room for factual scenarios that would violate the Rules.

Answer to Question 24

(C) - Rule 3.3(a)(3) entitled "Candor Toward the Tribunal" states that "[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) states that these ethical duties "continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by *Rule 1.6* (a client's confidences and secrets)."

A.B.A. Informal Opinion 353 (1987) states that "[i]f, prior to the conclusion of the proceedings, a lawyer learns that the client has given testimony the lawyer knows is false, and the lawyer cannot persuade the client to rectify the perjury, the lawyer must disclose the client's perjury to the tribunal, notwithstanding the fact that the information to be disclosed is information relating to the representation. . . ." Thus, because the court denied the attorney's motion, the

attorney must continue to represent client upon full disclosure of the perjury to the court, making choice (C) correct.

Answer to Question 25

(C) - Choices (B) and (D) are incorrect because a lawyer's filing of a claim or defense is not ethically proper or improper based upon whether the lawyer believes a recovery may or may not be had. Rather, Rule 3.1 dictates that a lawyer may not bring or defend a proceeding if the client's claim or defense is frivolous, i.e., not warranted under existing law. Here, if the attorney in good faith believed that the claim had some merit, the attorney will not be subject to discipline, and choice (C) is correct.

Answer to Question 26

(C) - An attorney may not write to or speak ex parte with a judge regarding a matter pending before the judge or regarding an impending matter that will be brought before the judge. *CJC § 2.9*. "If a judge inadvertently receives an unauthorized communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond." *CJC § 2.9(B)*. By sending the father's lawyer a copy of the list and the cover letter sent to the judge, the judge would be complying with *CJC § 2.9(B)*. Thus, choice (C) is the correct answer.

Answer to Question 27

(C) - "Among a lawyer's foremost professional responsibilities are fidelity to a client and preservation of confidences and secrets of a client. These responsibilities exist even if a person other than the client is paying the lawyers fee." *A.B.A. Informal Op. 1476 (1981)*. Thus, a lawyer, even though paid by the insurer, may not allow the fee payment to interfere with the lawyer's independent judgment and obligation to give undivided loyalty to the insured.

Although the lawyer's fee is paid by the insurance company, the insured is the actual client. The lawyer may not disclose information to the insurance company without the insured's informed consent and after full disclosure of the consequences of such disclosure. *A.B.A. Informal Op. 1476 (1981)*; *Rule 1.8(f)*; *A.B.A. Formal Op. 01-421 (2001)*.

"A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent." *Rule 1.8(b)*; see also *Rule 1.6(a)* ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."). Here, disclosure by the attorney of the possible exclusion to coverage would impermissibly disadvantage the woman. Thus, choice (C) is the best answer, and choices (A), (B), and (D), dependent upon disclosure or withdrawal, are incorrect.

Answer to Question 28

(D) - An attorney must maintain a separate account for clients' funds and not deposit the attorney's own money into that account. An exception to this general rule involves "joint funds"

of the client and attorney on which the attorney may write a check out of the attorney escrow account for the funds belonging to the lawyer, unless that amount is disputed by the client, in which event the attorney shall not withdraw that disputed amount until the dispute is finally resolved. *Rule 1.15(e)*. Here, the attorney's obligation is to return the undisputed funds (\$7,400) to the client and to hold the disputed funds (\$600) in escrow until the dispute is resolved. Thus, choice (D) is the best answer.

Answer to Question 29

(C) - It is the client who ultimately determines whether to settle or to litigate. Although a lawyer may not promote frivolous claims or defenses (*Rule 3.1*), "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." *Rule 1.2(a)*. "A lawyer shall abide by a client's decision whether to settle a matter." *Id.* Thus, provided the utility company's position is not frivolous, the Rules do not require the attorney to withdraw under the circumstances, making choice (C) a better choice than choice (D).

Answer to Question 30

(D) - Under Rule 1.5, the relevant factors to be considered in fixing a "reasonable" fee are the following:

- (a) The fee customarily charged in the locality for similar legal services (here \$10,000);
- (b) The amount involved (here \$10,000,000);
- (c) The nature and length of the professional relationship between the attorney and client; and
- (d) The experience, reputation, and ability of the lawyer performing the services.

Because each of these factors is represented in the fact pattern, choice (D) is the correct choice.

Answer to Question 31

(C) - An attorney's attitude about his client's ability to prevail or not prevail in the lawsuit (choices (A) and (B)) is of no real consequence; the issue is whether the asserted claim is "frivolous." Lawyers are required to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their positions." *Rule 3.1 cmt. 2*. A "claim is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery." *Id.* Clearly, many suits are asserted and defended by attorneys who feel their clients' positions are "hopeless" based on *stare decisis*. The ethical consideration in such a case, however, is whether there exists a "good faith" argument for an extension, modification, or reversal of existing law. *Rule 3.1*. Thus, choice (C) is the best answer and (D) is incorrect.

Answer to Question 32

(B) - Rule 1.16(d) states, “[u]pon termination of representation, a lawyer shall take steps to . . . [refund] any advance payment of fee or expense that has not been earned or incurred.” An amount retained over and above this amount is deemed “unreasonable.” Here, the attorney may retain, at most, \$800 for services actually performed. Thus, choice (B) is correct.

Answer to Question 33

(A) - To encourage lawyers to provide free, quick legal advice to the public with no expectation of future representation, the conflict of interest rules are relaxed under circumstances such as those indicated in this fact pattern, i.e., where it is not reasonable or foreseeable to ferret out existing conflicts during a necessarily brief consultation.

However Rule 1.7 (current client conflict) and Rule 1.9(a) (prior client conflict) do apply if the lawyers *knows* that the limited representation presents a conflict for the lawyer and *knows* (as the attorney here did) that further discussion will create a conflict of interest. Thus, the attorney’s continued conversation with the storeowner would disqualify the attorney, the partner, and their firm. *Rule 1.10*. Thus, choices (B) and (D) are incorrect and choice (A) is correct.

Although Rule 1.7 Comment 22 permits a client to consent to future conflicts, the efficacy of such consent is dependent upon how well the client reasonably understands the material risks that the waiver entails. Here, the attorney was currently aware of a present conflict and did not in fact obtain informed consent of the client. Thus, choice (C) is incorrect. Mere knowledge by the shopowner of the attorney’s representation of the other client is not a full disclosure. *A.B.A. Informal Op. 1495 (1982)*.

Answer to Question 34

(C) - Rule 1.9 prohibits representation of a new client having materially adverse interests to a former client in two situations:

- (1) Where the new representation is substantially related and adverse to the former client; or
- (2) Where the new representation is totally unrelated (as in this fact pattern), but where the lawyer in the current matter could use information obtained in the former representation to the disadvantage of the former client.

Here, the attorney’s access to confidential information from the prior representation of the husband would prohibit him from representing the new client. The confidential information was the husband’s ownership of real estate outside the state, obtained by the husband in the prior divorce proceeding, that could be used by the attorney to the disadvantage of the husband in the present matter. The exceptions to this rule are:

- (1) If the former client waives the possible conflict of interest and confirms such waiver in writing. *Rule 1.9(a)*; or

- (2) If the information has now become generally known. *Rule 1.9(c)(1)*.

Note, choice (B) is not a correct choice because, although the duty of loyalty toward the client ends when the legal matter is concluded, the duty of confidentiality continues.

Choice (D) is incorrect because a lawyer can represent another client in a matter adverse to a former client provided: (1) the matters are not substantially related and (2) in the prior representation the attorney did not obtain information that could be used in the new matter to the disadvantage of the former client. Thus, choice (C) is the best answer.

Answer to Question 35

(C) - Under Rule 1.6(a), generally an attorney can reveal a client's confidences and secrets only with the client's prior informed consent. "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation" to lawyers outside the lawyer's firm or to anyone. *Rule 1.6 cmt. 2*. Rule 1.1 mandates competent representation which, if necessary, may require referring the matter to, or associating or consulting with, another lawyer competent in that field, such as the trial counsel in the fact pattern. *Rule 1.1 cmt. 1*. However, before this is done, the lawyer must consult with and obtain the consent of the client. *Rule 1.6(a)*. Thus, choice (C) is better than choice (A).

Answer to Question 36

(B) - Rule 5.5(a) states that a lawyer shall not assist a person in the "practice of law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction." The practice of law involves the application of legal principles and judgment to the circumstances or objectives of another person or entity. Here, because the attorney is aiding the bank (through the bank's nonlawyer trust officer) in the unauthorized practice of law, the attorney is subject to discipline. Thus, choice (B) is the correct choice. The other answer choices leave much to be desired.

Answer to Question 37

(B) - A judge should perform the judge's duties impartially. *CJC § 2.2*. The critical fact here is that the judge did not previously serve as a lawyer in the matter presently before the judge. While there is no evidence of bias by the judge with respect to the defendant in the facts here, choice (B) introduces the possibility of bias. Here, choice (B) is more specific and better than choice (A).

Note, however, that if the facts stated that the judge was biased toward the defendant, then, even if none of the matters previously investigated by the judge as deputy attorney general were involved in the present case, *CJC § 2.11(A)(1)* would require the judge to disqualify himself.

Answer to Question 38

(A) - The Rules permit dual representation by one attorney where there exists no potential conflict. *Rule 1.7*. If a conflict does arise, the attorney must withdraw from representing either party. *Rule 1.9*; *Rule 1.7 cmts. 4 & 29 - 33*. Each client must be given informed consent, which must be confirmed in writing. *Rule 1.7(b)(4)*.

“When representation of multiple clients in a single matter is undertaken, the [attorney’s consultation with the clients] must include [an explanation of] the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.” *Rule 1.7 cmt. 18*. Thus, choice (A) is correct.

A lawyer may be paid from a source (here the manufacturer) other than the client (the vice president), if the client is informed of that fact and consents, and the arrangement does not compromise the lawyer’s duty of loyalty to the client. *Rules 1.8(f) & 5.4(c)*. Thus, choice (D) is incorrect.

Answer to Question 39

(C) - Here, there is a clear conflict between the active, tortious, and intentional conduct of the manager and the passive, vicarious conduct of the manufacturer. In the contempt proceeding, the manufacturer will attempt to exonerate itself by demonstrating that the manager’s act of shipping the labeled cans in question was intentional and unauthorized. This cannot be argued by an attorney who is simultaneously representing the manager’s interests, because the manager and the manufacturer are antagonistic to one another. Under the circumstances, the attorney could not zealously represent the interests of both clients simultaneously. Thus, choice (C) is the correct answer.

Answer to Question 40

(D) - Under Rule 1.7, where more than one client is involved and the lawyer withdraws because a conflict arises after representation of joint clients commences, Rule 1.9(a) makes clear that a “lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”

Here, because the manufacturer’s interests are materially adverse to the manager’s and the facts do not state that the attorney obtained the manager’s written consent to the attorney’s continued representation of the manufacturer, the attorney cannot continue to represent the manufacturer in the contempt proceeding. Thus, choice (D) is the correct choice.

Answer to Question 41

(B) - Rule 8.4(c) prohibits misconduct by an attorney involving dishonesty, fraud, deceit or misrepresentation committed inside or outside the scope of an attorney's professional activities. *A.B.A. Formal Op.* 336 (1974). Rule 8.5(a) provides that "[a] lawyer admitted to practice in [a] jurisdiction [here, State X] is subject to the disciplinary authority of [that] jurisdiction regardless of where the lawyer's conduct occurs." Thus, choice (B), which focuses on the attorney's fraudulent conduct is better than choice (A), which relies on civil claims of fraud.

Note that, if the attorney's misconduct in State Y involved the practice of law, then even though not admitted to the bar in State Y, the attorney would be subject to the disciplinary authority of both State X and State Y (for the protection of citizens in State Y). "A lawyer not admitted in this jurisdiction [State Y] is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction [State Y]. A lawyer may be subject to the disciplinary authority of this jurisdiction and another jurisdiction for the same conduct." *Rule 8.5(a)*. Thus, choice (D) is incorrect.

Answer to Question 42

(B) - Attorneys may arrange with banks to accept credit cards as payment for legal services and may also have referral agreements with banks for clients desiring loans for payment of legal fees. *N.C.S.B.* 11-193, *Op.* 678 (1969); *N.Y. State* 362 (1974) & 399 (1978); *A.B.A. Informal Op.* 338 (1974). Thus, choices I and II are proper.

Generally, a lawyer may not acquire a proprietary interest in a cause of action or subject matter of the litigation, except that a lawyer may: (a) acquire a lien authorized by law to secure the legal fee and (b) contract with a client in a civil case for a reasonable contingent fee. *Rule 1.8(i)*. Prior to the conclusion of a representation, a lawyer may not make or negotiate an interest in the literary or media rights with respect to the subject matter of the representation. *Rule 1.8(d)*. Thus, choice (B) is the best answer.

Note that an attorney can secure an unpaid fee by the use of a mortgage on the client's property, but not by acceptance of a deed. *N.Y.S. Op.* 550 (1983).

Answer to Question 43

(C) - The lawyer has a duty to fully inform the client of all alternatives in the case. *Rule 1.4*. Rule 1.2(a) requires the lawyer to "consult with the client as to the means by which [the client's objectives] are to be pursued." Under Rule 1.2(a), certain decisions are for the client to make, but the client may expressly or impliedly delegate that authority to the lawyer.

Here, the facts do not indicate that the attorney has advised the client of his reasoning. Without the client's consent, the attorney may not waive or refrain from asserting the valid defense of assumption of the risk. Thus, choice (C) is the best answer. While the attorney may be looking out for client's best interest at every stage, this fact, even coupled with his control over

trial tactics, does not negate the attorney's duty to consult with the client before dropping this powerful defense.

Answer to Question 44

(A) - Although the general caveat is that lawyers cannot attempt to limit their liability, they are allowed to form professional corporations, provided nonlawyers do not own stock or act as corporate directors or officers. Thus, although a nonlawyer can be hired as an administrative manager of the P.C., the nonlawyer-manager cannot hold shares or be an officer or director. Thus, arrangement II is improper. In addition, arrangement III is improper because the estate of a deceased lawyer-shareholder may hold stock during a "reasonable period" of estate administration, but permitting the estate to be a P.C. stockholder until children complete law school is not a reasonable period of estate administration. Thus, choice (A) is the correct answer.

Answer to Question 45

(B) - Rule 6.2 states that if a lawyer is called upon by a court to represent an indigent, the lawyer should not seek to be excused except for "compelling reasons" (e.g., accepting the appointment would violate the Rules) or where the representation would result in a true financial hardship. However, a lawyer may not accept such a call from the court if the lawyer is not, and cannot become, competent to handle the matter. *Rule 1.16 cmt. 1*. Thus, action I would be proper.

When a lawyer withdraws from employment, he should take "reasonable steps" to avoid any foreseeable prejudice to his client. *Rule 1.16(d)*. Asking for a stay or a continuance to allow substitute counsel time to prepare the case is such a "reasonable step." Thus, action II would be proper.

Action III is not a proper option because, if the attorney is not competent to represent the defendant, the attorney must withdraw from the representation. The defendant's consent is not relevant. Thus, choice (B) is correct.

Answer to Question 46

(D) - "[I]f the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board." *See Conflict of Interest Rules in Rule 1.7(b)*. Here, the attorney's duty to give independent advice, required by law, will likely be materially limited by his position as general counsel. Clearly, referring the matter to independent counsel here is the only proper, legal, and ethical position for the attorney to take. For corporate counsel, not independent from corporate influence, to render an opinion that the law requires to be independent violates both Rule 8.4(c) ("engage in conduct involving dishonesty, fraud, deceit or misrepresentation") and Rule 8.4(d) ("engage in conduct that is prejudicial to the administration of justice"), because the attorney's conduct would violate a specific statute. *Rule 8.4 annot. (2011)*. A prohibition on the attorney would likewise apply to all lawyers within his firm. *Rule 1.10*. Thus, the attorney can only refer this matter to outside, independent counsel, and choice (D) is correct.

Answer to Question 47

(C) - DR 2-101(B) of the old Code of Professional Responsibility outlines 25 permissible categories for advertising which Rule 7.1 impliedly adopts. *See Rule 7.1 cmt. 7; see, supra, Chapter IX.A.1.* Included in the list is that a lawyer may properly advertise the names of representative clients as long as the clients' written consent is obtained. Rule 7.1 does not list permissible categories for advertising, and simply prohibits "false or misleading communication about the lawyer or the lawyer's services." Choice (C) is the best answer here, because, if the trial lawyer obtained written consent from the clients referenced in the advertisement, he will not be subject to discipline.

Answer to Question 48

(C) - A lawyer can delegate authority to clerks, secretaries, and paralegals, provided the lawyer maintains supervision and responsibility for that work. In this fact pattern, if the attorney failed to supervise the legal assistant, the attorney would be subject, in addition to liability, to discipline. *Rule 5.3.* Thus, choice (C) is correct and choice (A), which does not contemplate the level of supervisory care undertaken by the attorney, is not. Allowing the time period to expire on a client's suit is clearly malpractice. Thus, choice (D) is incorrect.

Answer to Question 49

(A) - Rule 3.9 states that "a lawyer representing a client before a legislative body or administrative tribunal . . . shall disclose that the appearance is in a representative capacity and shall conform" with Rules 3.3 (candor toward tribunal), 3.4 (fairness to opposing party), and 3.5 (impartiality of tribunal, i.e., no ex parte communications with individual members of the tribunal). However, the client's identity need not be disclosed; the lawyer need only disclose that the lawyer is appearing in a "representative capacity" and not in a personal capacity as a concerned citizen. Thus, choice (A) is better than choice (B). Because the attorney may accept employment in accordance with the aforementioned rules, choices (C) and (D) are not the best answers.

Answer to Question 50

(D) - Rule 1.11(a) prohibits a lawyer from accepting private employment in a matter in which the lawyer "participated personally and substantially" while the lawyer was a public employee. *Rule 1.11(a).* Thus, choice (D) is the best answer.

Under the "screening" procedures of Rule 1.11(b), the law firm could represent the client if the attorney was screened from the case *and* if the district attorney's office was given notice to ascertain compliance with the screening requirements. Note that "screening" is not mentioned in the answer choices offered.

Finally, while choice (B) is a correct statement of law, prosecutors are privy to more than exculpatory evidence and it is not the best answer here.

Answer to Question 51

(C) - In A.B.A. Formal Opinion 02-427 (2002), the Committee on Ethics opined that it is not inherently unethical for a lawyer to ask a client to provide security for payment of a fee. Thus, choice (A) is incorrect.

In looking at this issue, almost every state, local, and national bar association ethics committee has concluded that although a fee agreement does not generally constitute a business transaction with a client governed by Rule 1.8(a), when a lawyer acquires by contract a security interest in a client's property, this acquisition is a business or financial transaction which must comply with Rule 1.8(a).

Rule 1.8(a) requires that:

- (1) The terms of the transaction be fair and reasonable and fully disclosed in writing to the client.
- (2) The client be advised in the writing of the desirability of seeking the advice of independent counsel.
- (3) The client be given a reasonable opportunity to seek the advice of counsel and to reflect on the matter.
- (4) The client give informed consent in writing, signed by the client, to the essential terms and to the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Thus, choice (C) is correct. It is not choice (A) or (B) because security interests are expressly permitted by Rule 1.8(a). "A lawyer shall not knowingly acquire [a] . . . possessory, security or other pecuniary interest adverse to a client unless" the transaction is fair and reasonable, fully disclosed in writing, the client is given time to reflect, and the client consents to the terms in writing signed by the client. *Id.*

Choice (D) is incorrect because A.B.A. Formal Opinion 02-427 permits a lawyer's taking of a security interest in a client's property even though the property is the subject of the litigation in which the lawyer is representing the client. Indeed, Rule 1.8(i) expressly permits such liens. In that regard, Rule 1.8(i) states that a "lawyer shall not acquire a proprietary interest in a cause of action or subject matter of litigation that the lawyer is conducting for a client, except the lawyer may:

- (1) Acquire a lien authorized by law to secure the lawyer's fee or expenses, and
- (2) Contract with a client for a reasonable contingent fee in a civil case."

Answer to Question 52

(C) - *CJC* § 3.4 prohibits a judge from accepting an appointment to a governmental committee or commission concerned with issues of fact or policy matters, other than those concerning the improvement of the law, the legal system, or the administration of justice. A

judge can accept appointment to the board of a private, not-for-profit, educational institution under *CJC* § 3.7.

Choice I is permissible because *CJC* § 3.7 *Comment* [4] permits the listing of a judge's name and title on fund-raising letterhead, provided comparable designations are listed for other board members.

CJC §3.7(A)(1) and (2) state that a judge may assist "such an organization or entity in planning related to fund-raising" but solicitation of contributions by the judge is limited to "members of the judge's family, or . . . judges over whom the judge does not have supervisory or appellate authority." Here, the judge may sit on the fund-raising committee (choice II), but the judge cannot act as the auctioneer (choice III). A judge can only speak at an event that serves a fund-raising purpose "if the event concerns the law, the legal system, or the administration of justice" which the school fund-raiser did not, and serving as an auctioneer would violate the prohibition on fund-raising from non-family members and judges. Thus, choice (C) is the best answer.

Answer to Question 53

(B) - The attorney-client privilege is much narrower than the lawyer's ethical duty to maintain client confidentiality. The Annotations to Rule 1.6 note that the attorney-client privilege is applicable only to communications made "in confidence" for the purpose of obtaining legal advice. The privilege is waived if the communication is subsequently disclosed. *Rule 1.6 annot. (2011)*. "If clients themselves divulge such information to third parties, chances are that they would have divulged it to their attorneys, even without the protection of the privilege. Thus, once a client has revealed client information to a third party, the basic justification for the privilege no longer applies." *Westinghouse Electric Corp. v. Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991). Thus, choice (C) is incorrect.

A communication to an attorney is not privileged if a client expects or intends that the communication will be embodied in a pleading, or will be repeated by the attorney to a non-privileged third person, in court or in negotiations. *In re Grand Jury Proceeding (John Doe)* 727 F.2d 1356 (4th Cir. 1986). "A communication . . . meant to be relayed to outsiders . . . can scarcely be considered confidential . . ." *McCormick, Evidence* § 91 at 333 (*J. Strong 4th ed. 1992*).

The information concerning the \$50,000 was not, under the facts of this question, given to the attorney for the purpose of seeking legal advice, but simply to advise the attorney of the client's position. Indeed, the client subsequently sent a similar letter containing the same information to the buyer.

This information, likewise, is not protected by the attorney work product privilege because it is not a reflection of the attorney's thought process and it was not delivered to the attorney, at the time, in anticipation of litigation. Thus, choice (D) is incorrect because regardless of whether the letter was written in anticipation of litigation or the client was seeking the attorney's legal advice,

the client subsequently disclosed the same information to the buyer, thus defeating any confidentiality. Accordingly, choice (B) is the best of the four choices.

Even if it could be argued that the letter was gathered as part of the attorney's work product privilege, it would nevertheless be subject to discovery under *Restatement (Third) of the Law Governing Lawyers*, sections 87 and 88. Under the *Restatement* section 88, if the buyer needs the letter to prepare for trial and permitting the attorney to withhold the letter would work a hardship on the buyer, then the letter is clearly discoverable.

Under these facts, the attorney would be permitted under Rule 1.6(a)(4) to disclose the letter in compliance with a court order. If the attorney is ordered to do so by the court, disclosure by the attorney would not be unethical.

Answer to Question 54

(A) - After full disclosure by the attorney to the client, it is the client who determines matters affecting a "substantial right" or the merits of the case. The lawyer's duty is to obtain any lawful objective sought by her client. Thus, choice (D) is incorrect.

Rule 1.2(a) states "a lawyer . . . shall consult with the client as to the means by which the objectives of representation are to be pursued." Rule 1.4 states that a lawyer shall "keep a client reasonably informed about the status of a matter [and] promptly comply with reasonable requests for information A lawyer shall explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Rule 1.4(a)(3)-(4) & 1.4(b)*. Here, the opponent's counsel is subject to discipline because she agreed to waive a complete defense available to her client without consultation with that client and without that client's consent. Thus, choice (A) is correct, and choice (C) is incorrect. Finally, choice (B), which discusses contract principles, is not applicable.

Answer to Question 55

(B) - Rule 4.3 governs a lawyer's dealings with an unrepresented person. First, the lawyer must immediately dispel the assumption that the lawyer is disinterested, i.e., that the lawyer represents no one, that the lawyer is equally protecting the interests of both the client and the unrepresented non-client, or that the non-client will suffer no harm by speaking freely. The lawyer must explain that the lawyer's client (here, the seller) has interests opposed to those of the unrepresented buyer. Because the interests of the buyer and seller are or have a reasonable possibility of being in conflict, the only legal advice that the attorney can give the buyer is to secure counsel in the matter. "This Rule does not prohibit a lawyer from negotiating a transaction or settling a dispute with an unrepresented person. So long as the lawyer explains that the lawyer represents the adverse party [the seller] and is not representing [the buyer], the lawyer may inform the person of the terms on which the lawyer's client will enter into the agreement . . . and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations." *Rule 4.3 cmt. 2*.

Here, the attorney gave an unrepresented person (the buyer) an opinion on the expiration of the underlying lease even though the attorney represented a party whose interest the attorney knew had a reasonable possibility of being in conflict with the interest of the attorney's client. As Rule 4.3 Comment 2 states: "The Rule distinguishes between situations involving unrepresented persons whose interest may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interest is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel."

The attorney did appropriately advise the buyer both orally and in writing to obtain legal counsel, but he incorrectly gave the buyer advice concerning the lease. This would subject the lawyer to discipline. Thus, choice (B), not choice (D), is the best of the four choices.

Choice (A) is overly broad since there is no per se prohibition against lawyers communicating with unrepresented persons.

Even though the attorney responded to the buyer's inquiries truthfully and without misrepresentation, the attorney's candor satisfies only the first requirement of Rule 4.3. Thus, choice (C) is not the best choice. The attorney knew that the interests of the buyer and seller are or have a reasonable possibility of being in conflict. Thus, the attorney should not have given any advice to the buyer other than for the buyer to get an attorney.

Answer to Question 56

(C) - A lawyer need not sell his or her entire law practice and may sell just one area of a practice. *Rule 1.17*. Thus, choice (A) is incorrect. "This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a practice pursuant to Rule 1.17." *Rule 5.6 (Restrictions on the Right to Practice) cmt. 3*. Accordingly, when an attorney sells an entire practice or entire area of practice, it is not unethical for the buyer to insist upon a restrictive covenant preventing the seller from competing in the practice of law in that practice or geographic area. Thus, choice (B) is wrong.

Rule 1.17 mandates that the attorney who sells his or her practice give written notice to each client regarding (1) the proposed sale, (2) the client's right to retain other counsel, and (3) that the client's consent will be assumed if the client does not take action within 90 days. Thus, choice (C) is the best choice.

There is no requirement that a seller retain legal malpractice insurance after selling all or part of a law practice. Thus, choice (D) is incorrect.

Answer to Question 57

(A) - A disbarred or suspended lawyer is not authorized to practice law. A lawyer who is suspended or disbarred from the practice of law must so inform all clients. Thus, the best choice is (A) and not choice (C) or (D).

Here, the attorney did not actually engage in the practice of law, but merely acted as a conduit by forwarding a settlement offer to the client and forwarding the client's acceptance of that offer back to the insurance company. Remember, the practice of law is giving another person an opinion as to the law or its application thereto. Thus, the attorney did not practice law, and choice (B) is incorrect.

Many jurisdictions (including New York) prohibit a suspended or disbarred lawyer from engaging even in work that a paralegal might perform, even though such work is not considered the practice of law. This prohibition is not, however, required under the Model Rules. Thus, the best choice is (A) and not choice (B).

Answer to Question 58

(C) - Under Rule 1.11(d), a lawyer currently serving as a public officer or employee is subject to Rule 1.7 (the prohibition against a concurrent conflict of interest). Thus, a public officer may not exploit public office for the advantage of a client. However, under Rule 1.11 Comment 9, a lawyer may jointly represent a private party and a government agency if it is permitted by Rule 1.17 and not otherwise prohibited by law.

Note that the facts state that the senator has relinquished her interest in and left her old law firm. Just because the wholesaler is a client of the senator's former law firm does not prohibit the senator from promoting the interests of the wholesaler as an elected official voicing concern for a constituent. Do not lose sight of the fact that the wholesaler is a constituent within the senator's district and that after conducting her own independent survey, the senator believed that the proposed regulation would be detrimental to the wholesaler and to other businesses headquartered in the state. Thus, (A) and (B) are incorrect and choice (C) is correct.

The fact that the senator is no longer practicing law does not immunize the senator from being subject to discipline, because Rule 1.11(d) speaks of a lawyer serving as a public officer or employee, and it says nothing about the practice of law. Indeed, the term "public employee" encompasses every capacity in which the government employs the lawyer. It is not necessary that the government employee or official be employed in his or her capacity as a lawyer. *Rotunda, Legal Ethics, The Lawyer's Deskbook on Professional Responsibility* §12-3 at 355 (2002-2003); *A.B.A. Formal Op. 342* (1975). Thus, choice (D) is incorrect.

Answer to Question 59

Choice (A) is correct. Rule 6.2 requires that "a lawyer shall not seek to avoid appointment by tribunal to represent a person except for good cause, such as:

- (a) Representation of the client is likely to result in violation of the Rules of Professional Conduct or other law;
- (b) Representation of the client is likely to result in an unreasonable financial burden on the lawyer;
- (c) The client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."

Rule 1.1 mandates lawyer competence. If an attorney who handles only civil matters does not feel competent to handle a criminal defendant's case, he must not continue with the matter; in fact, to do so would subject the attorney to discipline. Thus, choice (A) is the best choice.

Choice (B) is incorrect, because the fact that an attorney may not be compensated for his effort is not a sufficient basis for asking the court to be relieved from the matter. The financial burden required must impose a financial sacrifice so great as to be unjust. Choice (C) is not the best choice because it is overly broad. As set forth above, Rule 6.2 permits a lawyer to seek to be excused from court appointed representation for certain limited, compelling reasons. Finally, choice (D) is incorrect, because an attorney must seek to decline the appointment, the possible ire of the judge notwithstanding, if his continued representation would violate a rule of ethics, e.g., the attorney is not competent to handle the matter or has a conflict of interest.

Answer to Question 60

Choice (B) is correct. The attorney is required to "provide competent representation to a client. Competent representation requires the knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Rule 1.1*.

Comment 2 to Rule 1.1 states: "A lawyer can provide adequate representation in a wholly novel field through necessary study. Thus, choice (C) is incorrect. In the Annotations to Rule 1.1, the Reporter states "to the extent the lawyer must spend excessive amounts of time preparing for tasks that with experience become routine, the lawyer should not expect the client to pay for the lawyer's education." *Rule 1.1 annot. at 24-27 (2011)*. Thus, choice (B) is correct and choice (A) is not. The difference between (A) (believing that she could become competent) and (B) (becoming competent) is significant. The rules require competence, not an expectation or belief of impending competence that may not be fulfilled.

Absent a misrepresentation, the attorney is not required to inform a client that the attorney has never previously engaged in the type of matter in which counsel is sought, or that previously the attorney's practice has been limited to one particular area of law. Thus, choice (D) is incorrect.

1. **RAP**
Public Official's Name on Firm
 - R-** Regularly and
 - A-** Actively
 - P-** Practicing Law
2. **C²RAP**
Declining Employment or Mandatory Withdrawal
 - C-** Competency Lacking
 - C-** Conflict of interest
 - R-** Representation violates the Model Rules
 - A-** Advancing frivolous claims
 - P-** Physical or emotional condition of the attorney
3. **U-SUCH**
Attorney's Trial Testimony is Permitted
 - U-** Unlikely to be called
 - S-** Related to legal Services
 - U-** Uncontested issues
 - C-** Cumulative testimony
 - H-** Hardship on the client
4. **FOUR Fs**
Discretionary Withdrawal from Employment
 - F-** Fundamental disagreement with client
 - F-** Fraud or illegality pursued by client
 - F-** Financial burden too great on lawyer
 - F-** Fee agreement breached by client
5. **SOUND**
Responsibilities Upon Withdrawal
 - S-** Cooperate with the Subsequent counsel
 - O-** Recommend Other counsel
 - U-** Unearned money returned
 - N-** Notice of withdrawal given to the client
 - D-** Deliver papers to which the client is entitled subject to a retaining lien for the attorney's unpaid fee
6. **RENT A SERF**
Reasonableness of Fees
 - R-** Relationship with client (nature and length)
 - E-** Employment by others turned down
 - N-** Novelty of issue
 - T-** Time involved
 - A-** Amount customarily charged in that locality
 - S-** Skill
 - E-** Expertise
 - R-** Results achieved and amount involved
 - F-** Fixed or contingent fee
7. **7 Cs**
Revealing Secrets and Confidences
 - C-** Client consent (express or implied)
 - C-** Court ordered disclosure
 - C-** To Collect a fee or defend against a lawsuit or criminal charges
 - C-** Client's Criminal or fraudulent conduct
 - C-** Correct client's perjury
 - C-** Conflict check when changing jobs
 - C-** Conflict check for merging firms
8. **3 I's**
Payment of Fee by a Third Person
 - I-** Informed consent by the client
 - I-** No Interference by the third person
 - I-** Information remains confidential
- 8.-a Attorney's escrow duties – check the **DEAN'S** list
 - D** Deliver to whom it belongs
 - E** Escrow records maintained for Five years
 - A** Account rendered if demanded
 - N** Notice of must be promptly given upon receipt
 - S** Safeguard appropriately any tangible property

(Turn Over)

9. **WAIF**
Business Transactions with Clients
 - W-** Writing signed by the client
 - A-** Advise the client to seek counsel
 - I-** Informed consent on full disclosure
 - F-** Fair and reasonable transaction terms
10. **A.B.C.**
A client's signature is required for:
 - A-** Aggregate claim settlements
 - B-** Business transactions with a client
 - C-** Contingent fee agreements
11. **A POEM**
Don't Read "A POEM" at Trial
 - A-** Argue facts not in the record
 - P-** Passion appeals to the jury
 - O-** Personal Opinions
 - E-** Embarrass a witness
 - M-** Misstate evidence or knowingly present false evidence
12. **5th SLAP**
Client's Right to Decide
 - 5th-** Whether to take the stand or invoke the 5th Amendment
 - S-** Settle a civil case and decide the terms
 - L-** Litigate by judge or jury
 - A-** Assert Affirmative defenses
 - P-** Plea bargain in criminal case
13. **GRIPE (CD - Lawyer's Speech)**
Prohibited Public Statements
 - G-** Opinions of **G**uilt or innocence
 - R-** Results of or refusal to take tests
 - I-** Identification/credibility of witness
 - P-** Plea possibilities
 - E-** Existence of a confession
14. **WAIVE (CD - Lawyer's Speech)**
Permissible Public Statements
 - W-** Warn public of danger
 - A-** Assistance of public requested
 - I-** Investigation in progress
 - V-** Victim's identification
 - E-** Explanation of crime or defense raised
15. **JP HEAD (CD - Lawyer's Speech)**
Permissible to News Media
 - J-** Judicial proceedings
 - P-** Public record
 - H-** History of accused
 - E-** Evidence (not confessions)
 - A-** Arrest circumstances
 - D-** Defendant's denial
16. **P-FIB (CD - Judiciary)**
Disqualification of a Judge
 - P-** Previous **P**articipation in the matter
 - F-** Family relationship to a party
 - I-** Interest (\$) in the outcome
 - B-** Bias based on personal knowledge or prejudice
17. **SLICE (CD - Judiciary)**
Permitted Judicial Campaigning
 - S-** Speak and attend political gatherings on her own behalf
 - L-** Distribute election **L**iterature and appear in media advertisements
 - I-** Identify herself as a member of a political party
 - C-** Contribute to her own campaign but not to other individual candidates
 - E-** Publicly **E**ndorse or oppose other candidates for the same judicial office
18. **BIG FLAP (CD - Judiciary)**
A part time judge is not prohibited from:
 - B-** Employment by a **B**usiness
 - I-** Reporting nonjudicial **I**ncome
 - G-** Appointment to a **G**overnment commission
 - F-** Serving as a **F**iduciary
 - L-** Practicing **L**aw
 - A-** Serving as an **A**rbitrator
 - P-** Political activities